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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

To: Advisory Committee on Civil Rules
From: Myles V. Lynk and Richard L. Marcus
Date: April 5, 2004
Re: E-Discovery Proposals for Discussion at the April 2004 Meeting

I. Introduction

Set forth below are two types of materials for the consideration of the Advisory Committee. First, there are recommendations from the Discovery Subcommittee, proposing for publication and comment amendments to the Federal Rules of Civil Procedure, to address certain unique features about the disclosure and discovery of electronically stored information (so-called "electronic discovery") in civil litigation, and the related issue of inadvertent privilege waiver (forfeiture) in the context of voluminous responses to discovery requests. These recommendations include proposed rule language and proposed Committee Notes to accompany the rule changes.

Also set forth below are other proposals as to which there is no consensus on the Subcommittee for publication. The Subcommittee is bringing these proposals before the full Advisory Committee for its consideration and decision whether any should be published for comment. In addition, where the Subcommittee is submitting alternative versions of rule language for consideration, the Advisory Committee will be asked to decide whether all, or some, or one, or none, of the alternatives should be published. As to these proposals, the memorandum attempts to outline the issues that appear to bear on these alternatives instead of proposing a draft Committee Note. In at least one instance where there is disagreement about whether rule-making should be pursued, the memorandum attempts to summarize the different views.

The Subcommittee's proposals can be approached in a number of different ways; it may be most helpful to group them into five categories, as follows:

1. Proposals to require the parties to meet and confer about electronically stored information and disclosure of privileged information.

- The Subcommittee recommends amendments to Rule 26(f), Form 35 and Rule 16(b) that would direct the parties to address early in the litigation issues relative to the disclosure and discovery of electronically stored information and how the parties will handle the inadvertent disclosure of privileged information, and would permit the court to include any such agreement in its pretrial order. There is a consensus within the Subcommittee in support of this proposal. (Part II)

2. Proposals to define and apply electronically stored information and address the form of production of such information.

- The Subcommittee recommends for publication amendments to Rule 34(a) that would add the term "electronically stored information" to the rule, and discussion of this change in the Committee Note. This term would be used to refer to this subject throughout the civil rules. Some consideration was given to the term, "digital data" as a perhaps more precise alternative, but it was rejected as potentially confusing to some and therefore unhelpful (Part III).

- The Subcommittee recommends for publication a small amendment to Rule 33(d) and language in the Committee Note to make clear that this provision applies to electronic data; an earlier proposal to add a new Rule 33(e) has been dropped (Part IV).

- The Subcommittee recommends for publication amendments to Rule 34(b) to permit a requesting party to specify the form in which electronically stored information must be produced; to permit a responding party to choose a form of production between two options if none is specified; and to provide that production need be made only in one form unless the parties agree or the court orders otherwise, together with a corresponding Committee Note (Part V).

- The Subcommittee recommends for publication amendments to Rule 45 to conform this rule to the amendments being proposed in the other discovery rules, particularly Rule 34 (Part VI).[1]

3. Alternative proposals regarding a "safe harbor" against sanctions for certain data destruction policies.

- The Subcommittee recommends for publication a so-called "safe harbor" provision that would be added to Rule 37 to address the specific and unique concerns presented by automatic computer data destruction systems that operate as part of routine document retention and destruction programs, and offers alternative versions of possible rule language, with explanatory Commentary. This provision would provide protection against sanctions under these rules for the operation of such programs, except in specified circumstances (Part VII).

4. Alternative proposals regarding a "two tier" approach to discovery of certain electronically stored information.

- The Subcommittee is forwarding to the Advisory Committee for its consideration various alternative proposals that would amend either Rule 26(b) or Rule 34(a) to require a party to obtain a court order before it can obtain electronically stored information from a responding party (or person under Rule 45) that is not easily accessible or routinely accessed or maintained by the responding party or person in the usual course of its regularly conducted activities. (Part VIII)

5. Additional proposals to address privilege waiver/forfeiture issues.

- In addition to addressing privilege waiver concerns in the "meet and confer" provisions of Rule 26(f), Form 35 and Rule 16(b), the Subcommittee also recommends the following additional proposals on this subject: Publishing for comment a proposed amendment to Rule 26(b)(5) that would permit a party (or person under Rule 45) to take back a document or information it had produced in

[1] Some of the specific language presented herein for Rule 45 has not previously been before the Subcommittee, although the Subcommittee has addressed the need for such changes.

> discovery if it subsequently determines within a reasonable time that such document is privileged; and having the Civil Rules Advisory Committee present to and discuss with the Evidence Rules Advisory Committee additional rule language in order for the Committees to jointly determine how best to address more substantive privilege waiver or forfeiture concerns through the applicable rule-making process. (Part IX)

As you know, the Subcommittee has been studying discovery of electronically stored information for over five years, and within the past year has focused a significant amount of time and resources on this subject. It may be helpful to briefly review this work, as it suggests the extent to which these proposals and these issues have been considered by the Subcommittee. On September 5, 2003, the Subcommittee met in Washington, DC, to discuss the overall issue of electronic discovery in the context of specific rule-making proposals that were developed through our outreach to the profession in 2002. The results of that meeting were presented to the Advisory Committee at its meeting in Sacramento on October 2, 2003. Also at that meeting, the Subcommittee announced its plans to host a major conference on electronic discovery early in 2004. On February 20 and 21, 2004, the Subcommittee did host a major conference on electronic discovery at Fordham Law School in New York City. Judges and scholars, and lawyers representing widely differing views in the electronic discovery debate, were invited to discuss the multiple issues surrounding our effort to address through the rule-making process concerns presented by electronic discovery in civil litigation. The conference attracted almost 200 attendees. It provided us with extremely useful feedback and ideas. The Subcommittee then met by conference call on February 25 to discuss what we had learned at the Fordham conference, and to refine the proposals we were considering. Then, on March 22 the Subcommittee held another all day meeting in Washington to discuss proposed final drafts of its recommendations. This meeting was followed by another conference call on March 31 to complete this review. Thus, the proposals that come before you are the result of a long and careful process in which the Subcommittee has considered various alternatives, different perspectives and many ideas.

The problems of privilege waiver have been on the Subcommittee's agenda since before attention was drawn to discovery of electronically stored information. In the past, however, satisfactory specific solutions have not emerged.

Of course, the threshold inquiry remains whether to propose any rule changes at all. As in the past, publishing possible rule amendments for comment helps the committee determine

what the answer to that question should be. Some thoughtful lawyers have argued against amending the Federal Rules of Civil Procedure to address civil discovery issues raised by the ubiquity of electronically stored information in today's world.[2] The Subcommittee has considered these views, and also has considered alternative suggestions that rule changes would be appropriate and are necessary to assist the courts and the bar in addressing this difficult subject. In fact, two states already have amended their civil rules to include provisions for electronic discovery,[3] and four United States district courts have amended their local court rules to include such provisions.[4] As a result of its consideration of various views, the Subcommittee recommends publishing specific proposals for comment and response from the bench and bar.

Among those who urged amendments to the Federal Rules of Civil Procedure, there were differences as to the breadth and scope of the rule changes proposed. Some commentators have suggested that dramatic changes to the discovery rules are necessary; others, that minimal changes are all that is required. The Subcommittee does recognize, of course, that not all changes that might improve the conduct of civil litigation in the federal courts can or should be made through amendments to the rules of civil procedure. But where rule changes are appropriate, they should be proposed. The recommendations and proposals set forth below are made in the light of this recognition.

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[2] E.g., New York State Bar Assn., "Does Discovery of Electronic Information Require Amendments to the Federal Rules of Civil Procedure?," (Feb. 22, 2001).

[3] Texas Rules of Civil Procedure § 196.4; Mississippi Supreme Court Order 13, amending Rule 26 of the Mississippi Rules of Civil Procedure and its Comment (May 29, 2003).

[4] Local Rule 26.1, E.D. Ark.; Local Rule 26.1, W.D. Ark.; Local Rule 26.1, D. N.J.; Local Rule 26.1 & Appendix D, D. Wyoming.

II. Early Discussion of Electronic Discovery Issues -- Rules 26(f), Form 35, and Rule 16(b)

Set forth below are recommended amendments to Rule 26(f), Form 35, and Rule 16(b), in that order, together with proposed Committee Notes.

Rule 26. Duty to Disclose;
General Provisions Governing Discovery

* * *

(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); discuss preservation of evidence; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. 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) any issues relating to disclosure or discovery of electronically stored information including the form of production;

(D) whether the court should enter an order that facilitates discovery by protecting the right to assert privilege after [inadvertent][5] production[6] of privileged information; 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).

Committee Note

The Committee has repeatedly been told that problems associated with discovery of various types of information generated by or stored on computers need attention in the rules. Among other things, electronically stored information is distinctive in its volume. See Manual for Complex Litigation (4th) § 11.446 (describing the "sheer volume" of such information). Electronic data may exist in dynamic databases that do not correspond readily to hard-copy documents traditionally subject to discovery. Even the ordinary operation of computers --

[5] Whether this bracketed word should remain could be debated, but it does seem that inadvertent production is the issue that has caused concern among those reporting to the Subcommittee. There might be more difficulties in protecting purposeful revelation of privileged materials followed by an assertion of privilege.

[6] Earlier versions of this provision included disclosure as well as production, but that has been removed. Disclosure is limited to materials that a party may use to support its case. If it does so, it waives the privilege, so it seems odd to protect items disclosed. Moreover, we have not been told the burden that results from broad discovery, and the need to review voluminous materials, also is true of disclosure, either under Rule 26(a)(1) or (a)(3).

including the simple act of turning a computer on -- can alter or destroy such information, and computer systems often automatically discard or overwrite some data based on the date of creation. Similarly, computers often automatically create information the operator may not realize is being created, and that has no direct counterpart in hard-copy documents. Electronically stored information may be "deleted," yet continue to exist, but in forms difficult to locate, retrieve, or search. Together, these and other distinctive features of electronically stored information justify specific attention in the rules.

Rule 34(a) is amended to confirm that electronically stored information is subject to discovery. Its broad definition of electronically stored information should be applied at other points in the Rules where the expression is used, such as in Rule 26(f)(3)((C). Rule 33(d) is similarly amended to show that the option to produce business records includes electronically stored information. Rule 45 is amended to make clear that electronically stored information may also be obtained by subpoena. Although courts have generally not had difficulty concluding that electronically stored information is properly a subject of discovery, these changes make the rule language consistent with the practice.

Other amendments address specific aspects of discovery of electronically stored information. Thus, Rule 34(b) is amended to authorize a party to specify the form in which electronically stored information should be produced and to authorize the responding party to object to that request. [Rule 37(h) is added to address sanctions requests in instances in which electronic data have become unavailable.] **[Revisit when the identity of the rules in the package becomes clear.]**

Subdivision (f). Early attention to managing discovery of electronically stored information can be important. Rule 26(f)(3) is amended to direct the parties to discuss these subjects during their discovery-planning conference. See Manual for Complex Litigation (4th) § 11.446 ("The judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case"). The rule focuses on "issues related to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, addressing the issues at the outset should often avoid problems that might otherwise arise later in the litigation, when they are more difficult to resolve.

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

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. See Manual for Complex Litigation (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the period for which discovery may be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is readily accessible by the party that has it; whether the burden or cost of retrieving and reviewing the information is justified; and whether cost allocation is appropriate. The form or forms in which a party keeps such information also may be considered, as well as the forms in which it might be produced for review by other parties. "Early agreement between the parties regarding the forms of production will help eliminate waste and duplication." Manual for Complex Litigation (4th) § 11.446. Even if there is no agreement, discussion of this topic may prove useful. Rule 34(b)(1)(B) is amended to permit a party to specify the form in which it wants electronically stored information produced. An informed request is more likely to avoid difficulties than one made without adequate information.

Form 35 is also amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court, thus enabling the court to address the topic in its Rule 16(b) order. Provision for any aspects of disclosing or discovering electronically stored information that are suitable for discussion under Rule 26(f) may be included in the report to the court. Any that call for court action, such as the extent of the search for information, directions on evidence preservation, or cost allocation, should be included.

Rule 26(f)(2) is amended to direct the parties to discuss preservation of evidence during their conference as they develop a discovery plan. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations. Cf. Manual for Complex Litigation (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties' discussion should aim toward specific provisions, balancing the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business. Cessation of ordinary operation of disaster-recovery systems, in particular, may rarely be warranted. [Rule 37(f) is added to recognize that loss of possible evidence due to the routine operation of an electronic information system is ordinarily not subject to sanctions.] **Delete if this provision does not go forward.** Failure to attend to these issues early in the litigation increases uncertainty and raises a risk of later unproductive controversy. Although these issues have great importance with regard to electronically stored information, they are also important with hard copy and real evidence. Accordingly, the rule change should prompt discussion about preservation of all evidence, not just electronically stored information.

Rule 26(f)(3) is also amended to direct the parties to consider asking the court to enter a case-management order facilitating discovery by protecting against privilege waiver. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege are often difficult to identify, and failure to withhold even one such item may result in waiver of privilege as to all other privileged materials on that subject matter. Not only may this effort impose substantial costs on the party producing the material, but the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems can become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make it particularly difficult to determine whether it is covered by a privilege. In addition, some information associated with

operation of computers poses particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic document files but not apparent to the creator of the document or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic document file but not make them apparent to the reader. Other data describe the history, tracking, or management of an electronic document (sometimes called "metadata"), and are not apparent to the reader. One of the topics to be discussed during the Rule 26(f) conference is whether this information should be produced. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

The Manual for Complex Litigation notes these difficulties:

> A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Manual for Complex Litigation (4th) § 11.446.

Parties may sometimes minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide requested materials for initial examination without waiving any privilege -- sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5). On other occasions, parties enter agreements -- sometimes called "clawback agreements" -- that production without intent to waive privilege should not be a waiver so long as the producing party identifies the documents mistakenly produced, and that the

documents should be returned under those circumstances. Other arrangements may be appropriate depending on the circumstances of each litigation, which will guide the choice among various forms of agreement.

As noted in the Manual for Complex Litigation, these agreements can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and reducing the cost and burden of review by the producing party. As the Manual also notes, a case-management order implementing such agreements can further facilitate the discovery process. For that reason, Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent privilege forfeiture or waiver that the parties have reached, and Rule 16(b) is amended to emphasize the court's entry of an order recognizing and implementing such an agreement as a case-management order. The amendments incorporate both the agreement of the parties and the entry of a court order based on the parties' agreement. If the parties agree on such an order, it should be included in the report to the court.

[Rule 26(b)(5)(B) is added to provide an additional protection against inadvertent privilege waiver by establishing a procedure for assertion of privilege after such production, leaving the question of waiver to later determination by the court if production is still sought.] **Inclusion of this paragraph depends on whether the Rule 26(b)(5)(B) proposal is adopted.**

Form 35. Report of Parties' Planning Meeting

* * *

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

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

Disclosure or discovery of electronically stored information should be handled as follows: _____(brief description of parties' proposals) _____

A privilege protection 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)_____.]

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Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling and Planning.[7]

(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.

[7] It has been suggested that adding discovery of electronically stored information and privilege waiver agreements to Rule 16(b) might not be appropriate because the heading indicates that the rule is only about scheduling. This restoration of the title presently used for Rule 16(b) reflects the reality that the amendments add matters that go beyond pure scheduling. That could also be said of other topics already in Rule 16(b), such as the extent of discovery, that are permitted topics for the order. Because the Rule 26(f) conference and Form 35 report are focused on Rule 16(b), it seems best to leave the provision in Rule 16(b).

(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 information;

(iv) provide for protection against waiver of privilege;

(v~~iii~~) set dates for other conferences and for trial; and

(vi~~iv~~) 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.

Committee Note

Rule 26(f)(3) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise later.

Rule 26(f)(3) has also been amended to add consideration of possible provisions to facilitate discovery by minimizing the risk of waiver of privilege. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privileges to enable the party seeking production to designate the materials desired for actual production, with the privilege review of those materials to follow. Alternatively, they may agree that if privileged information is produced the producing party may by timely notice assert the privilege and obtain return of the materials. Other arrangements are possible. A case-management order to effectuate such arrangements may be helpful in avoiding delay and excessive cost in discovery. See Manual for Complex Litigation (4th) § 11.446. Rule 16(b)(3)(B)(iv) recognizes the propriety of including such directives in the court's case management order. Court adoption of the chosen procedure by order advances enforcement of the agreement between the parties and adds protection against nonparty assertions that privilege has been waived by inadvertent production.

III. Definition of Electronically Stored Information -- Rule 34(a)

Set forth below are recommended amendments to Rule 34(a) and a Committee Note.

Rule 34. Producing Documents, Electronically Stored Information, 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, test or sample[8] the following items in the responding party's possession, custody, or control:

(A) any designated electronically stored information or any designated documents, ~~--~~including writings, drawings, graphs, charts, photographs, sound recordings, images,[9] and other data or data compilations in any medium, from which information can be obtained either directly or after the responding party translates it into a reasonably usable form, or

(B) any tangible things ~~-- and to test or sample these things~~; or

(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,

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[8] During the Style Project, the question arose whether testing and sampling should be available with regard to all materials discoverable under Rule 34, and not just property or things, as appeared under the current rule. Although it was thought that this change should not suitably be considered nonsubstantive, and therefore not appropriate under the Style Project, it can be included in this set of substantive amendments. Because it may be of considerable importance in some cases involving electronically stored information, it has been included in this package. As mentioned in the draft Committee Note, the change is not limited to electronically stored information, however.

[9] It was thought wise to add this term, in case it might not be captured by the others already in the rule.

photograph, test, or sample the property or any designated object or operation on it.

Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to authorize discovery of data compilations in an anticipation that the use of computerized information would grow in importance. Since that time, the growth in use of electronically stored information, and in the variety of systems for creating and storing such information, has been dramatic. It is difficult to say that all forms of electronically stored information fit within the traditional concept of a "document." Accordingly, Rule 34(a) is amended to acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery, and the title of Rule 34 is modified to acknowledge that discovery of electronically stored information stands on equal footing with discovery of documents.

The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against attempting a limiting or precise definition of electronically stored information. The definition in Rule 34(a)(1)(A) is expansive, including any type of information that can be stored electronically. A common example that is sought through discovery is electronic communications, such as e-mail. A reference to "images" has been added in case those might be thought not to be included in the listing already provided. The reference to "data or data compilations" includes any databases currently in use or developed in the future. The rule covers information stored "in any medium," to encompass future developments in computer technology. Rule 34(a)(1)(A) is intended to be broad enough to cover all types of computer-based information, and flexible enough to encompass new forms that come into use in the future.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive definition. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the definition in Rule 34(a)(1)(A) is invoked in a number of other amendments, such as those to Rules 26(f)(3), **[list those in this amendment package]** 26(b)(5)(B), 34(b) and 37(f).

In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1)((A).

The definition of electronically stored information is broad, but whether material within this definition should be produced is a separate question that must be addressed under Rule 26(b)(2), Rule 26(c), and **[cite new rule on burden, if included]**.

Rule 34(a) is amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly provides that such discovery is permitted. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2)(B) and 26(c).

IV. Option to Produce Electronically Stored Information in Response to Interrogatories -- Rule 33(d)

Set forth below is a recommended amendment to Rule 33(d) and Committee Note.

Rule 33. Interrogatories to Parties

* * *

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, inspecting, compiling, abstracting, or summarizing a party's business records, <u>including electronically stored information</u>, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to permit the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine, audit, and inspect the records and to make copies, compilations, abstracts, or summaries.

COMMITTEE NOTE

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term "electronically stored information" has the same broad meaning in Rule 33(d) as in Rule 34(a). Much business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its format or because it is dependent on a particular computer system. Rule 33(d) says that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can use it "as readily as the responding party," and Rule 33(d)(2) provides that the responding party must give the interrogating party a reasonable opportunity to

examine the information. Depending on the circumstances of the case, satisfying these provisions may require the responding party to provide some combination of technological support, information on application software, access to the pertinent computer system, or other assistance. In any case, the key question is whether such support enables the interrogating party to use the electronically stored information as readily as the responding party.

V. Form of Production -- Rule 34(b)

Set forth below are recommended amendments to Rule 34(b) and a Committee Note.

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

* * *

(b) Procedure.

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

(A) *Required contents.* The request must describe with reasonable particularity each item or category of items to be inspected,~~;~~ and ~~**(B)**~~ specify a reasonable time, place, and manner for the inspection and for performing the related acts.

(B) *Form of electronically stored information.* The request may specify the form in which electronically stored information is to be produced.

(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 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, including an objection to the requested form for producing electronically stored information, stating 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 rest.

(D) *Producing the documents or electronically stored information.* Unless the parties otherwise agree, or the court otherwise orders,

(i) 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.

(ii) If a request for electronically stored information does not specify the form of production under Rule 34(b)(1)(B), a party must produce such information in a form in which the producing party ordinarily maintains it, or in an electronically searchable form.[10] A party producing electronically stored information need only produce it in one form.

Committee Note

Subdivision (b). Rule 34(b)(1)(B) permits the requesting party to designate the form in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials. Specification of the desired form may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The parties should exchange information about the form of production well before production actually occurs, such as during the early opportunity provided by the Rule 26(f) conference. Rule 26(f)(3)(C) now calls for discussion of form of production during that conference.

The rule does not require the requesting party to choose a form of production; this party may not have a preference, or may not know what form the producing party uses to maintain its electronically stored information. If the request does not specify a form of production for electronically stored information, Rule 34(b)(2)(D)(ii) provides the responding party with options

[10] The term "in an electronically searchable form" was devised by the Subcommittee, and technical advice might be sought on whether there is a better term.

analogous to those provided in Rule 34(b)(2)(D)(i) with regard to hard-copy materials. The responding party may produce the information in a form in which it ordinarily maintains the information. If it ordinarily maintains the information in more than one form, it may select any such form. But the responding party need not produce the information in the form in which it is maintained. Instead, the responding party may produce the information in a form it selects for the purpose of production providing the form is electronically searchable. Although this option is not precisely the same as the option under Rule 34(b)(2)(D)(i) to produce hard copy materials organized and labelled to correspond to the requests, it should be functionally analogous because it will enable the party seeking production to locate pertinent information.

If the requesting party does specify a form of production, Rule 34(b)(2)(B) permits the responding party to object. The grounds for objection depend on the circumstances of the case. When such an objection is made, Rule 37(a)(2)(B) requires the parties to confer about the subject in an effort to resolve the matter in a mutually satisfactory manner before a motion to compel is filed. If they cannot agree, the court will have to resolve the issue. The court is not limited to the form initially chosen by the requesting party, or to the alternatives in Rule 34(b)(2)(D)(ii), in ordering an appropriate form or forms for production. The court may consider whether a form is electronically searchable in resolving objections to the form of production.

Rule 34(b)(D)(ii) provides that electronically stored information ordinarily need be produced in only one form, but production in an additional form may be ordered for good cause. One such ground might be that the information cannot be used by the party seeking production in the form in which it was produced. Advance communication about the form that will be used for production might avoid that difficulty.

[The following paragraphs are to be used if there is no two-tiered production provision (see Part VIII)]

Under Rule 34(b)(2), a responding party may also object on grounds other than the requested form of production to a request for discovery of electronically stored information. One such objection may be to the burden of locating, retrieving, reviewing, and producing requested electronically stored information. In part because of the variety and amount of electronically stored information, and in part due to the rapidity of technological change, access to or restoration of electronically stored information may impose significant burdens. Some electronically stored information may be stored solely for use in the event of a disaster, and is not

accessed or maintained in the usual course of a party's activities. Some information may be "legacy" data that remains from obsolete systems; such data is no longer used and may be costly and burdensome to restore and retrieve. Other information may have been deleted -- the electronic equivalent of thrown away -- but technology provides the capability to retrieve and produce it, although extraordinary effort may be required. The ability to obtain these additional categories of information not only increases the costs and burdens of retrieval, but also increases the volume of information that must be reviewed for production, which in itself increases the cost of discovery.

These issues often should be addressed during the parties' Rule 26(f) conference. If they have not been resolved in that manner, such an objection should be followed by a conference about ways to resolve the difficulty.

Courts addressing these concerns have properly referred to Rule 26(b)(2) for guidance in deciding when and whether the effort involved in obtaining such data is warranted. Thus Manual for Complex Litigation (4th) § 11.446 invokes Rule 26(b)(2) and states that "the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems." It adds: "More expensive forms of production, such as production of word-processing files with all associated metadata or production of data in specified nonstandard format, should be conditioned upon a showing of need or sharing expenses."

The proper application of those principles can be developed through judicial decisions in specific situations. Caselaw has already begun to develop principles for making such determinations. See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002); *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2000). Courts will be able to adapt the principles of Rule 26(b)(2) to the specific circumstances of each case in light of evolving technology. **[If burden provisions (see VIII below) are included, this Note material may be inappropriate here, and might be moved to a Note accompanying that provision.]**

VI. Subpoena for Electronically Stored Information -- Rule 45

Set forth below is a recommended amendment to Rule 45, and a Committee Note. This is the first time the Subcommittee has proposed consideration of this amendment, and the full set of amendments was drafted only after the March 31 conference call, so most members of the Subcommittee have not seen it. This proposal is intended to track, in Rule 45, the changes made elsewhere in the discovery rules. If those changes are modified or not pursued, corresponding modifications should be made to Rule 45.

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) *Requirements*. Every subpoena must:

(i) state the court from which it issued;

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

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify, or produce and permit the inspection, ~~and~~ copying, testing or sampling of ~~designated~~ documents, electronically stored information, or tangible things designated in the subpoena in that person's possession, custody, or control, or permit the inspection of premises; and

(iv) set for the text of Rule 45(c) and (d).

(B) *Command to Produce Evidence or Permit Inspection.* A command to produce evidence or to permit inspection, testing or sampling may be

included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set forth in a separate subpoena. A subpoena may specify the form in which electronically stored information is to be produced.

(2) ***Issued from Which Court.*** A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production, ~~and~~ inspection, testing or sampling if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney, as an officer of the court, may also issue and sign a subpoena from:

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

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court in which the action is pending.

(b) Service.

(1) ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena on a named person requires delivering a copy to that person and, if the subpoena commands that person's attendance, tendering to that person the fees for

one day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served on the named person, a notice must be served on each party as provided in Rule 5(b).

(2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the court from which it issued;

(B) outside that district but within 100 miles of the place of the deposition, hearing, trial, production, ~~or~~ inspection, testing or sampling specified in the subpoena;

(C) within the state of the court from which it issued if a state statute or court rule permits serving a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, ~~or~~ inspection, testing or sampling specified in the subpoena; or

(D) that the court authorizes, if a United States statute so provides, upon proper application and for good cause.

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs the issuance and service of a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the court from which the subpoena issued a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and must impose on a party or attorney who fails to comply with the duty an appropriate sanction, which may include lost earnings and reasonable attorney's fees.

(2) ***Command to Produce Materials, or Permit Inspection, Testing, or Sampling.***

(A) *Appearance Not Required.* A person commanded to produce and permit the inspection, ~~and~~ copying, testing or sampling, of designated electronically stored information, documents or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* Subject to Rule 45(d)(2), a person commanded to produce and permit inspection ~~and~~ copying, testing or sampling, may serve on the party or attorney designated in the subpoena a written objection to inspecting or copying, testing or sampling, any or all of the designated materials or to inspecting the premises or to the requested form of production. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court from which the subpoena issued for an order compelling production, inspection, ~~or~~ copying, testing or sampling.

(ii) Inspection, ~~and~~ copying, testing or sampling may be done only as directed in the order, and the order must protect a person who is

neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court from which a subpoena issued must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from the place where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), such a person may be commanded to attend a trial by traveling from any place within the state where the trial is held;

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

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court from which it issued may, on timely motion, quash or modify the subpoena if it requires:

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

(ii) disclosure of an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) travel of more than 100 miles to attend trial by a person who is neither a party nor a party's officer, as a result of which the person will incur substantial expense.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the party on whose behalf the subpoena was issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena

(1) **(A)** ***Producing Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business, or organize and label them according to the categories of the demand.

(B) ***Producing Electronically Stored Information.*** If the subpoena does not specify a form of production for electronically stored information under Rule 45(a)(1)(B), a person responding to a subpoena to produce electronically stored information must produce such information in a form in which the person ordinarily maintains it or in an electronically searchable form. A person producing electronically stored information need only produce it in one form.

(2) ***Claiming Privilege or Protection***

(A) *Privileged materials withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i)~~**(A)**~~ expressly assert the claim; and

(ii)~~(B)~~ describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the applicability of the privilege or protection.

(B) *Privileged materials produced.* When a person produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After such notice, the requesting party must promptly return or destroy the specified information and any copies to the producing person, who must comply with Rule 45(d)(2)(A) with regard to the information and preserve the information pending a ruling by the court.[11]

(e) Contempt. The court from which a subpoena issued may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place not within the limits of Rule 45(c)(3)(A)(ii).

Committee Note

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(A)(iii) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. As under Rule 34(b), Rule 45(a)(1)(B) is amended to provide that the subpoena can designate a form for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b)(2)(B), to authorize the party served with a subpoena to object to the requested form. In addition, as under Rule 34(b)(2)(D)(ii), Rule 45(d)(1)(B) is amended to

[11] This provision is based on proposed new Rule 26(b)(5)(B), which will be discussed in Part IX below. It is inserted here as a parallel change assuming that it the Committee decides to go forward with the addition of Rule 26(b)(5)(B). If the Committee decides not to go forward with Rule 26(b)(5)(B), this change will not be included.

provide that the party served with the subpoena must produce electronically stored information either in a form in which it is usually maintained or in an electronically searchable form, and that the party producing electronically stored information should not have to produce it in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding party. The Rule 45(c) protections should guard against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." In many cases, advance discussion about the extent, manner, and form of producing electronically stored information should alleviate such concerns.

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

[Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege after inadvertent production of privileged information.] **Adding this Note language depends on going forward with the 26(b)(5)(B) amendment.**

Throughout Rule 45, further amendments have been made to conform the rule to the changes described above.

VII. Sanctions Safe Harbor -- Rule 37

The Subcommittee spent considerable time discussing ways to address the duty to preserve or to provide a safe harbor against sanctions. The dynamic nature of electronically stored information has generated uncertainty as to preservation obligations and the attendant risk of sanctions. One central problem is that often it will be difficult to say that electronically stored information is entirely gone, but only that the information would be very expensive to locate or recreate. Thus, the problem is usually one covered by Rule 26(b)(4)(B), and the actual circumstances that would call for a sanctions rule to apply to truly unavailable or lost information would seem quite unusual. Another issue is one that was involved in both the preservation and the sanctions discussion -- the extent to which electronically stored information should be treated differently from other discoverable matter. In a package of amendments prompted by concerns about electronically stored information, it appears best to restrict attention to issues unique, or at least very distinctive, to that form of information, and the following alternatives are limited to electronically stored information.

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

* * *

[Alternative 1]

(f) **Electronically Stored Information.** A court may not impose sanctions on a person[12] [under these Rules][13] for failure to preserve electronically stored information if the person

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[12] The rule refers to a "person" rather than a "party" because its protection against sanctions should apply to nonparties, such as those served with a subpoena.

[13] The "under these Rules" phrase may be undesirable. Often spoliation sanctions are based on the court's inherent authority, and in that sense perhaps not "under these Rules." It is likely that a safe harbor that does not affect spoliation sanctions would not provide sufficient protection. Accordingly, this phrase might best be deleted.

Deleting the phrase might suggest that the rule was forbidding any type of sanction -- fines, criminal charges, etc. -- for failure to retain information. But there are multiple retention obligations in other bodies of law, and sanctions in other proceedings for violating those obligations should presumably not be impeded by a new provision in Rule 37. Instead, the goal

acted reasonably to preserve such information. A person acts reasonably [under these Rules][14] by preserving electronically stored information that it maintains in the usual course of its regularly conducted activities if the information appears reasonably likely to be discoverable in reasonably foreseeable litigation, and by routinely and in good faith operating its electronic information systems, unless:

(1) the person willfully or recklessly deleted or destroyed the information when it knew or should have known that the information was reasonably likely to be discoverable in reasonably foreseeable litigation; or

(2) a prior court order [in the action,][15] [a statute, or a regulation][16] required the person to preserve the information.

[Alternative 2]

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is only to forbid sanctions in the context of civil litigation for failure to retain information. A Note could try to make this clear.

Another approach might be say "A failure to preserve electronically stored information does not violate these rules * * *." But that seems not to address Rule 37 issues, and to be more of a preservation rule. The Subcommittee has decided that adopting a preservation rule would raise too many difficulties. In addition, it could be that the point about inherent authority mentioned above would mean that saying elsewhere in the rules that failure to preserve does not violate the rules would not affect the court's inherent authority to treat it as sanctionable.

[14] The use of "under these Rules" at this point may not raise the issues it raised when used in the first sentence, and it could be helpful to clarify that this provision does not purport to affect the preservation obligations or requirements imposed by other bodies of law. But since this sentence is just a definition of "reasonably," as used in the first sentence, there seems scant risk of this interpretation, and a Committee Note should be sufficient to dispel whatever concerns remain.

[15] The phrase "in the action" would limit the power to sanction to situations in which this court has entered the preservation order. Should that be added? One argument against adding it is that a person ordered to preserve information should not be insulated against sanctions for violating the order no matter whether the order was entered by this court. But if there is concern that some courts (perhaps some state courts) might be too quick to enter preservation orders, perhaps even ex parte, removing the safe harbor based on the order of another court is inappropriate.

[16] This addition was suggested during the March 31 conference call. Given the very large array of preservation directives found in statutes or regulations, adding this provision might rob Rule 37(f) of much force. On the other hand, insulating against sanctions in the case for conduct that violated a statute or regulation may seem dubious.

(f) Electronically Stored Information. A court may not impose sanctions on a person [under these Rules] for failure to preserve electronically stored information if

(1) the person took reasonable steps, when it knew of should have known that the information was reasonably likely to be discoverable in reasonably foreseeable litigation, to preserve the information; and

(2) the failure resulted from the normal operation of the person's electronic information system; and

(3) no prior court order [in the action,] [statute or regulation] required the person to preserve the information.

Commentary

These two alternatives seek to accomplish something that we have been told is extremely important to a significant class of litigants -- businesses and governmental litigants that have to rely on computer systems that automatically delete materials. Both alternatives seek to limit sanctions without otherwise undertaking to articulate a duty to preserve. At the Fordham Conference, one topic was a possible rule governing preservation. Questions were raised about whether such a rule would exceed the rulemaking powers of this Committee. Preservation obligations are imposed by many statutes and regulations, and recently several have been added.[17]

[17]For example, 15 U.S.C. § 78u-4(b)(3)(C) provides as follows:

> (i) In general
>
> During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

This Committee would not undertake to relax those requirements, so it would be necessary to be clear that no supersession of those provisions was intended if the preservation route were taken. And a preservation duty in the rules might look odd if it purported to regulate a party's behavior before a suit was filed in federal court. Limiting the use of sanctions should pose fewer difficulties than trying to articulate a duty of preservation that would be relevant in any context other than sanctions, and on this count both alternatives would seem to stand on firm footing.

Both alternatives rely on "reasonable" behavior, that is defined. Alternative 1 would forbid sanctions for failure to retain materials that are not routinely maintained, unless a court order so required, or the party in bad faith allowed the destruction of such materials knowing that they should have been preserved. Some caselaw -- see *Zubulake v. UBS Warburg, Inc*., 2003 WL 22410619 (S.D.N.Y. 2003) -- suggests that backup tapes need not generally be preserved, although the party may have a duty to preserve them when it should realize that they contain relevant e-mail messages not otherwise available from persons likely to be involved in the litigation. Alternative 2 attempts to describe a "litigation hold" and may be more limited in the protection it affords than Alternative 1.

In considering these alternatives, it may be helpful to keep some ideas in mind. One is that this is only a limitation on sanctions. Many situations in which information has been lost would not be exempted from sanctions by Rule 37(f), but that need not lead to the conclusion that Rule 37(f) says sanctions should routinely be imposed in those situations. To the contrary, the courts possess considerable discretion in deciding whether sanctions are warranted, and in selecting appropriate sanctions. In one sense, this provision would matter only when a court would want, using that discretion, to impose a sanction. Looked at another way, however, the

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(ii) Sanction for willful violation

A party aggrieved by the willful failure of an opposing party to comply with clause (i) may apply to the court for an order awarding appropriate sanctions.

As another example of such a preservation obligation, consider SEC Rule 17a-4:

Every [] broker and dealer shall preserve for a period of not less than 3 years, the first two years in an accessible place . . . [o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such.

See Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 314 n.21 (S.D.N.Y.2003) (quoting this provision).

point here is to reassure litigants and prospective litigants that they can rest easy about sanctions if they adhere to certain preservation practices. Thus, although the amendment package does not adopt a preservation obligation, it does create an incentive to adhere to what Rule 37(f) treats as sufficient to avoid sanctions.

A different point is that, by forbidding sanctions against those who comply with what Rule 37(f) says precludes sanctions, the rule somehow implies that sanctions should be imposed on those who fail to comply. That result might be supported on the ground that these are reasonable preservation goals, and that failure to comply with them should ordinarily be a ground for sanctions. But this can be countered with the argument that the purpose of Rule 37(f) is to create a relatively limited area in which a person is made immune to sanctions by complying with the provisions of the rule. To say that all other failures to preserve should be sanctioned would, in that sense, misconceive the goal of the amendment. These considerations could be explored in the Note.

Yet another consideration is that the "litigation hold" approach that is reflected in both alternatives, but perhaps more directly in Alternative 2, could confront a party with a very difficult choice. Presumably there is no need to preserve duplicates. Rule 26(b)(2)(B)(i) seems to recognize that there is no need to access duplicate items if a copy has been produced. So the question might seem to be whether there are additional materials on backup tapes or in similar places that routinely are recycled. But a party that foresees litigation might have difficulty knowing whether there are alternative sources for the pertinent information. For example, in *Zubulake*, it seems that defendant had about 100 requested e-mails without resorting to backup tapes, while plaintiff had retained 450. Could a prospective defendant in that position make a reasonable decision whether it could recycle backup tapes? Probably the answer to this question is that there will inevitably be some difficult choices that a party must make once litigation is visible on the horizon. By focusing on reasonableness, the rule probably provides as much guidance as it can, and courts will have to make determinations under that standard in light of the facts of given cases.

VIII. The Distinctive Burden of Electronic Discovery -- Rule 34(a) or Rule 26(b)(2)

The Subcommittee spent a considerable amount of time after the Fordham conference discussing whether to limit the obligation to obtain electronically stored information from sources that are difficult to access or that are not ordinarily accessed in the routine course of the producing party's business or activities. The Subcommittee has not reached consensus on whether any amendment proposals should be published.

The discussion have sometimes call this the "two-tiered approach," modeled on the "two tiered" provisions added to Rule 26(b)(1) in 2000 to regulate discovery of material not ordinarily accessed by the party. The Subcommittee has considered three alternatives: leave the issue to caselaw as it develops under Rule 26(b)(2); amend Rule 26(b)(2) specifically to address electronically stored information; or amend Rule 34(a). Before turning to the specifics of these three alternatives, this memorandum attempts to preview the issues raised by the basic question whether to propose amendments in this area at all.

A. The Question Whether to Propose Amendments

Arguments Against Amendments

A starting point from the perspective of a skeptic about adopting these proposals is the assumption that some form of Rule 37 "safe harbor" provision will be included. Thus, the package will provide protection against undue intrusion into the operation of businesses and governmental agencies and others who might be stymied by draconian preservation requirements. A second point is that the basic guideposts are already in the Rules -- the provisions of Rule 26(b)(2)(B). In a real sense, one can see the proposals below as simply repeating that these provisions should be considered in determining the extent of discovery of electronically stored information in individual cases. But these proposals also draw a line that could prove quite unfortunate by providing an initial exemption from production of relevant information that party does not routinely access, or that is not "reasonably accessible."

A third point for questioning such a rule change is the presumption of American discovery that producing parties must provide relevant information at their own cost, unless they can make the showing called for by Rule 26(b)(2)(B) to excuse providing the information. But under these proposals, it could be that relevant information that would not be difficult to obtain

would nevertheless be exempted from "first tier" discovery, and possible that the party seeking it would have to devise an argument to overcome the seeming resistance in the rules to having such material produced. Given the growing importance of electronically stored information, and the growing ease of accessing it as technology improves, the appropriateness of such a limitation is quite dubious, and it should be carefully considered.

It seems as though a major stimulus behind this proposal is the concern that too much information would be discoverable unless this line were adopted to make certain relevant information presumptively discoverable, and other information discoverable only on a showing of good cause. Until now, the Civil Rules have always placed the burden on the party opposing production of relevant information. These proposals say that requesting parties should not ordinarily have access to certain types of information. Although there may be a large effort in some cases to access some of this information, there seems no strong reason for supposing that would always -- or even usually -- be the case. When it is true, the existing rules provide sufficient protection, and Rule 34(b) authorizes an objection on such grounds. Already, the draft Committee Note to the changes to Rule 34(b) makes these very points, although subject to being moved to accompany these provisions if they are adopted.

Another factor to keep in mind is that provisions like these could, to some extent, become incentives for parties to curtail what they maintain or access, or to adopt information systems that make certain information difficult to access. Admittedly the litigation consequences of such arrangements may not be foremost in the mind of those who design and select information systems, but given the importance we have been told that many attach to the questions we are considering, it seems reasonable to think about whether "safe harbor" provisions might cause frequent litigants to design their systems with an eye to what the safe harbor protects.

In sum, from the perspective of a skeptic about proceeding with these proposals, the two-tiered structure adopted in 2000 for Rule 26(b)(1) was fundamentally different. It therefore does not provide a model for what is proposed below. The rules now provide all the protection that is needed, and the protection that these proposals would provide would erode the basic structure of the discovery rules.

Arguments For Amendment

Arguments for proposing amendments emphasize the huge volume of material that would be presumptively discoverable even were one of these proposals adopted, and the relative rarity of justifications for going beyond discovery of routinely accessed or readily accessible material.

All these alternatives seek to implement an assumption that routine insistence on obtaining electronically stored information that is not reasonably accessible to a party but could conceivably be produced because it is there and technology provides a way to locate and retrieve it, should be rejected. In addition, one option would also excuse initial resort by a responding party to information that is not accessed by or maintained for that party in the usual course of its activities, Instead, this effort should be ordered only when justified under the provisions of Rule 26(b)(2)(B).

A starting point is that, arguably, almost all electronically stored information can be located if sufficient effort is made to locate it. But the cost of such an effort can be stupendous, which would seem to directly to invoke the provisions of Rule 26(b)(1)(B). Even if more data become more "accessible" in the future -- for example, if backup tapes are replaced by other forms of disaster recovery storage that are better organized -- the problem of the costs of retrieval may be exceeded by the problem of the costs of review. The ability of technology to make all data available, including, for example, deleted data, makes so much information discoverable as to threaten litigants' and courts' ability to limit the cost and time involved. And as discussed in VII above, the problem of putting protections in the rules against inappropriate sanctions for "deleted" or "unavailable" materials is quite difficult; the question may be seen to devolve into a question of costs, not one of entirely "missing" data.

We have been repeatedly told that the efforts that would be involved in obtaining this information far outweigh any reasonable value the information could have. Using "accessible" or "available" by itself may be inadequate. Technology may make huge amounts of information "accessible," but that creates the potential of unlimited volume. Volume in itself drives the cost and burden of discovery intolerably high. Adding the limitation "not routinely maintained by the producing party in the usual course of its regularly conducted activities" requires a showing of good cause before production can be compelled for "deleted" data; for data retained only for disaster recovery, or for legacy data, even if there is better technology to "access" such categories of data. And at the same time, the amount of information that is reasonably accessible or

routinely maintained for a party in the usual course of its regularly conducted activities (and therefore unaffected by this provision) remains enormous, making it sensible to draw an initial dividing line that should be crossed only when the criteria of Rule 26(b)(4)(B) legitimate such an effort.

The burden of access is not the only one that should be considered. As the sheer amount of information subject to discovery escalates, the burden of reviewing it for responsiveness, privilege, etc., escalates as well. Indeed, we are proposing amendments to protect against privilege waiver partly to address exactly this concern. It would be odd to be indifferent to such burdens when we address this topic. However much technology may improve the ability to retrieve material from electronically stored information, it is unlikely to eliminate this burden. Yet because much of this information is duplicated in other places or other forms, the benefits of that effort would be questionable even if there were no particular burden in obtaining the information in the first place.

In sum, failing to act on this topic seems to overlook what we can foresee will occur as more and more data become more and available -- discovery costs may rise uncontrollably. Acting in this manner would provide at least an initial protection against this result, and at little cost for parties seeking discovery. To some extent, the information we are discussing has come into existence by serendipity since it was not created or maintained on purpose. Parties should have to mine the fruits of that serendipity only when a judge has determined that the effort would be warranted.

B. Alternative Amendment Formulations

Set forth below are three basic alternative amendments (with variations) that would try to reduce the response burden by excusing or guarding against unduly burdensome efforts to retrieve, restore, and review some electronically stored information. Commentary follows to identify some of the considerations that would affect the choice among these alternatives.

[Alternative 1]

Rule 34. Producing Documents, Electronically Stored Information, 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, test or sample the following items in the responding party's possession, custody, or control:

(A) any designated electronically stored information or any designated documents, ~~--~~ including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which information can be obtained either directly or after the responding party translates them into a reasonably usable form, or

(B) any tangible things ~~-- and to test or sample these things~~; or

(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, test, or sample the property or any designated object or operation on it.

[Alternative 1A]

(3) ***Electronically Stored Information Discoverable Without Court Order.*** Parties may obtain discovery of electronically stored information that is reasonably accessible to the responding party [in the usual course of its regularly conducted activities].[18] For good cause, the court may order discovery of electronically stored information that is not reasonably accessible [in the usual course of the producing party's regularly conducted activities], subject to the limitations of Rule 26(b)(2)(B).

[Alternative 1B]

(3) ***Electronically Stored Information Discoverable Without Court Order.*** Parties may obtain discovery of electronically stored information that is routinely maintained by the responding party in the usual course of its regularly conducted activities. For good cause, the court may order discovery of electronically stored information that is not routinely accessed by or maintained for the responding party in the usual course of its regularly conducted activities, subject to the limitations of Rule 26(b)(2)(B).

[Alternatives 2 and 3]

Rule 26. Duty to Disclose:
General Provisions Governing Discovery

* * *

(b) Discovery Scope and Limits

* * *

[18] As noted in the Commentary below, if the "reasonably accessible" formulation is used, there is a question whether to include the phrase "in the usual course of its regularly conducted activities."

(2) ***Limitations on Frequency and Extent.***

* * *

(B) ***When Required.*** The court must limit the frequency or extent of discovery otherwise permitted under these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving the issues.; or

[Alternative 2A]

(iv) undue burden or expense would result from discovery of electronically stored information that is not reasonably accessible to the producing party [in the usual course of its regularly conducted activities].

[Alternative 2B]

(iv) undue burden or expense would result from discovery of electronically stored information that is not routinely accessed by or maintained for the producing party in the usual course of its regularly conducted activities.

[Alternative 3A]

(C) ***Electronically Stored Information.*** Electronically stored information that is not reasonably accessible to the responding party [in the usual course of its regularly conducted activities] need not be produced unless[19] the court so orders subject to the limitations of Rule 26(b)(2)(B).

[Alternative 3B]

(C) ***Electronically Stored Information.*** Electronically stored information that is not routinely accessed or maintained by the responding party in the usual course of its regularly conducted activities need not be produced unless the court so orders subject to the limitations of Rule 26(b)(2)(B).

(D~~C~~) ***On Motion or the Court's Own Initiative.*** The court may act on motion or on its own after reasonable notice.

Commentary

The purpose of this amendment is to give better guidance in applying the (b)(2)(B) factors to the unique features of electronically stored information. Rule 26(b)(2)(B) identifies the

[19] Another alternative would be use "must be produced only if" rather than "need not be produced unless":

[Alternative 3A]*

(C) ***Electronically Stored Information.*** Electronically stored information that is not reasonably accessible to the responding party [in the usual course of its regularly conducted activities] must be produced only if the court so orders subject to the limitations of Rule 26(b)(2)(B).

[Alternative 3B]*

(C) ***Electronically Stored Information.*** Electronically stored information that is not routinely accessed or maintained by the responding party in the usual course of its regularly conducted activities must be produced only if the court so orders subject to the limitations of Rule 26(b)(2)(B).

concerns that ought usually guide such an inquiry. (B)(iii) seems most pertinent, as the cost versus benefit analysis would usually be the starting point. (B)(i) also may have a role to play, particularly with regard to such sources as backup tapes, since they will contain much information that duplicates information obtainable from more conventional sources. There may also be cases in which (B)(ii) would apply. For example, if discovery has already involved considerable and expensive forays into computerized data, the desire of a party to have another go at it might be found unjustified.

The alternatives offer different ways of trying to accomplish basically the same thing. Alternative 1, the Rule 34 approach, targets the issue where it most frequently arises, in the document-production context. The addition of a provision to Rule 34(a) would seem a corollary to the amendments explicitly and broadly announcing that electronically discoverable information can be obtained under that rule, but it might seem odd for Rule 34(a)(3) in essence to repeat what's already said in Rule 34(a)(1). Proposed Rule 34(a)(3) borrows the structure of Rule 26(b)(1)'s "two tier" approach to relevancy questions by announcing that only certain potentially discoverable material is subject to attorney managed discovery, while more aggressive discovery is subject to the court's regulation under a good cause standard informed by Rule 26(b)(2)(B).

Alternatives 2 and 3, the Rule 26(b)(2) approaches, would provide protection against arguments that discovery into electronically stored information sought to be put into the "second tier" could be obtained routinely by other means than document production -- interrogatories or Rule 30(b)(6) depositions come to mind. Alternative 3 may make it clearer that all three (b)(2)(B) factors are potentially applicable, but Alternative 2 is intended to operate in conjunction with items (i), (ii), and (iii).

The purpose of the new Rule 34(a)(3) or the new Rule 26(b)(2) provisions would be to provide a starting point for application of the Rule 26(b)(2)(B) principles to electronically stored information by excusing initial resort to such information that is not reasonably accessible or routinely maintained in the usual course of the producing party's regularly conducted activities, subject to the court's order that it be produced consistent with the provisions of Rule 26(b)(2)(B).

One choice to be made in any of the alternatives is whether to key the duty of responding to whether information is "reasonably available" to the responding party or to whether it is "regularly accessed by or routinely maintained by the party in the usual course of its regularly conducted activities" by the responding party. A variant of this is whether, if we were to use the

"reasonably available" formulation, it would be useful to add "in the usual course of its regularly conducted activities."

The "reasonably accessible" formulation may be too open-ended. Reasonableness is obviously a rule provision that bears much weight, but whether it can usefully bear this weight could be debated. The "ordinary course" approach might be a simpler one for courts to apply, since information about what information a party uses in its activities could be easier to assess. And "ordinary course" would be less dependent on, or affected by, technological changes that might be urged to make virtually everything accessible at some point in the not-too-distant future.

But if the focus is on the producing party's usual activities the protection could apply even though it would be no effort whatsoever to access certain information. The discovery limitation would apply because responding party doesn't do so -- "We never look in that closet." Should that behavior pattern of the responding party limit its obligation to respond to discovery?

Perhaps a marriage of the two concepts can be achieved by focusing on whether the information is "reasonably accessible in the usual course of the producing party's regularly conducted activities." This might constrain the breadth of the "reasonably accessible" standard by invoking what the party usually does, but still permit insistence on doing something more -- looking in the closet in which it doesn't look -- if that would constitute a minor deviation from the party's usual activities and involve no significant burden beyond the burden it bears in its usual activities.

Another concern about using the "routinely accessed by or maintained for" approach would be that it could be read to put metadata and embedded data entirely off limits to discovery absent a court order. Most parties probably don't routinely access or intentionally maintain that information (at least if "maintaining" means purposeful activity). That does not seem to be the goal of this provision, and indeed the Committee Note to the Rule 26(f) amendment (Part II above) implies that there is no such limitation by urging the parties to talk about whether to pursue discovery of such material.

These formulations could focus on business activities only, like the "ordinary course of business" provision of Texas Rule 196.4. It may be that "course of business" limitation would be undesirable. It would not likely include non-business activities no matter how broadly "business"

is interpreted. But we have not been told that this sort of problem of insistence on access to materials not normally accessed has arisen with any frequency in non-business settings.

A Committee Note would attempt to flesh out the concept, whatever terminology is ultimately adopted. The phrase "usual course of its regularly conducted activities" is offered as a way to capture both business and nonbusiness activity. Whatever phrase is used, it could be that this restriction would be abused; parties might take a very restrictive attitude toward what they can or do access in their ordinary activities.

As between Alternatives 2 and 3, one question would be whether it is desirable to include in the "generic" provisions of current (b)(4)(B) something that is only about a specific kind of discovery. Alternative 2 is meant to permit invocation of (i), (ii), and (iii) as well as (iv) in connection with discovery of electronically stored information, a point that would probably need to be made in a Note.

In addition, it would probably be important, if the "usual course of its regularly conducted activities" phrase is used, to say in the Note that this means all activities, not just responding to discovery. *Cf. TIPS, Inc. v. U.S. Dep't of Defense*, 350 F.3d 1191 (9th Cir. 2003), in which the Department refused to provide information sought by an F.O.I.A. request in zip format. Under its regulations, agencies should use "business as usual" to decide whether to provide electronically stored information in requested formats. D.O.D. took the position that zip format was not "business as usual," but plaintiff showed that it used zip format with its contractors. D.O.D. responded that this evidence was irrelevant because its "business as usual" standard had to be applied to its ordinary way of responding to F.O.I.A. requests. The court rejected this view: "The language of FOIA does not support a reading that distinguished between 'business as usual' for FOIA requests and 'business as usual' for activities that are part of the agency's business." Id. at 1195. The same view should apply to the search burden in responding to discovery under an "ordinary course of regularly conducted activities" standard.

IX. Privilege Waiver -- Rule 26(f), Form 35, and Rule 16(b)

Set forth below are a recommended amendment to Rule 26(b)(5) and a recommendation that the Committee defer additional amendments regarding privilege waiver issues pending possible consultation with the Advisory Committee on Evidence Rules concerning rule-based solutions to some of these problems.

A. Proposed New Rule 26(b)(5)(B)

Set forth below is a draft amendment to Rule 26(b)(5) that was suggested during the Subcommittee's March 31 conference call, and the Subcommittee accordingly did not have a chance to review the exact language set forth below.

Rule 26. Duty to Disclose;
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* * *

(b) Discovery Scope and Limits.

* * *

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Privileged materials withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i)~~**(A)**~~ expressly make the claim; and

(ii)~~(B)~~ describe the nature of the documents, communications, or things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable

other parties to assess the applicability of the privilege or protection.

(B) *Privileged materials produced.* When a party produces information without intending to waive a claim of privilege it may, within a reasonable time,[20] notify any party that received information of its claim of privilege. After such notice, the requesting party must promptly return or destroy the specified information and any copies to the producing party, which must comply with Rule 26(b)(5)(A) with regard to the information and preserve the information pending a ruling by the court.

Committee Note

The Committee has repeatedly been advised that privilege waiver, and the review required to avoid it, add to the costs and delay of discovery. Rule 26(f)(3) is amended to direct the parties to discuss privilege waiver in their discovery plan, and Rule 16(b) is amended to alert the court to consider a case-management order to provide for protection against waiver of privilege.

Rule 26(b)(5)(A) provides a procedure for parties that have withheld information under a claim of privilege to make that claim so that it can be presented to the court if it is contested. Rule 26(b)(5)(B) is added to provide a procedure for parties that have inadvertently produced privileged information to assert that privilege claim and permit the matter to be presented to the court for its determination.

Rule 26(b)(5)(B) does not address the question whether there has been a privilege waiver. Orders entered under Rule 16(b)(3)(B)(iv) may have provisions bearing on whether a waiver has occurred. In addition, the courts have developed principles for determining whether such a

[20] An alternate formulation would be "within 30 [60] days of production." That would have the advantage of being specific. But depending on the circumstances, that could be too little or too much time. If the information was produced very early in the case, and no use was made of it, many months might be a reasonable period because there would be no prejudice to any party. On the other hand, if the information were produced shortly before trial, 30 days might be too long. Indeed, it might even have been used in connection with the trial before the claim of privilege is made.

waiver has occurred due to inadvertent production of privileged information. See 8 Fed. Prac. & Pro. § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for addressing these issues.

Under Rule 26(b)(5)(B), a party that has produced privileged information must notify the parties who received the information of its claim of privilege within a reasonable time. The rule directs that this notice be given within a "reasonable time." Many factors would bear on whether the time was reasonable in a given case, including the date when the producing party learned of the inadvertent production, the extent to which other parties had made use of the information in connection with the litigation, the difficulty of discerning that the material was privileged, and the magnitude of production.

The rule does not prescribe a particular method of notice. As with the question whether notice has been given in a reasonable time, the manner of notice should also depend on the circumstances of the case. It may be that in many cases informal but very rapid means of asserting the claim would be a reasonable means of initial notice, followed by more formal notice. Whatever the method, it would be desirable for the notice to be as specific as possible about the information claimed to be privileged, and about the producing party's desire that the information be promptly returned or destroyed.

The party that received the information must promptly return or destroy it on receipt of notice. The option of destroying the information is included because some of the information may have been incorporated in protected trial-preparation materials, and returning the information could compromise that protection.

Whether or not the information is returned, the producing party must assert its privilege in compliance with Rule 26(b)(5)(A) preserve the information pending a ruling by the court on whether the privilege is properly asserted. As with claims of privilege made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim of privilege.

B. Joint Consideration of Further Privilege Waiver Issues with the Advisory Committee on Evidence Rules

During the Fordham conference, the Committee had before it discussion drafts of rule amendments that would have taken a more aggressive approach than the one proposed here. One sought to adopt the majority "common law" rule for inadvertent privilege waiver.[21] Another built on Texas R. Civ. Pro. 193(d) and provided for belated assertion of privilege with regard to materials turned over without the intention to waive privilege.[22]

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[21] The idea was to add a new Rule 34(b)(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
>
> **(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; and
>
> **(vi)** any other matter that bears on the fairness of waiver.

[22] This was also put as a possible new Rule 34(b)(E):

> **(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.

At the Fordham conference, questions were raised about whether these topics could suitably be included in the Civil Rules rather than the Evidence Rules. In addition, questions were raised about whether such rules would implicate 28 U.S.C. § 2074(b), which provides that rules "creating abolishing, or modifying an evidentiary privilege" could not go into effect unless approved by an Act of Congress.

In consideration of these factors, the Subcommittee proposes that the Committee not proceed at present with either of these possible changes. Although there seemed to be substantial arguments that Civil Rule provisions along the lines discussed in the drafts would be consistent with the Committee's authority as a regulation of the discovery process, the Subcommittee concluded that a better course may be suggesting to the Standing Committee that this Committee undertake a joint examination with the Advisory Committee on Evidence Rules of whether coordinated provisions along these lines might be appropriate.