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2006 E-Discovery Seminar:

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

TUESDAY, NOVEMBER 14, 2006
NY MARRIOTT FINANCIAL CENTER
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E-Discovery Seminar

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AREAS OF EXPERIENCE

- Advertising Injury
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- Arson and Fraud
- Asbestos
- Bad Faith
- Brownfields Development
- Class Action & Multidistrict Litigation
- Complex Torts & Products Liability
- Construction Defect
- Construction Law & Litigation
- Directors & Officers Responsibilities & Liability
- Electronic Discovery Disputes
- Employee Practices Liability Coverage
- Employment Discrimination & Wrongful Discharge
- Employment Practices Litigation Defense
- Environmental Coverage
- Environmental Litigation
- Environmental Subrogation & Recovery
- Errors and Omissions
- Excess and Surplus
- Fidelity
- General Liability
- Healthcare Litigation
- Insurance Coverage Claims/Litigation
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- Labor & Employment
- Labor & Employment Litigation
- Legal Malpractice
- Life Science & Medical Device Litigation
- Life, Health & Disability
- Long Tail/Toxic
- Primary/Excess
- Products Liability
- Professional Liability Coverage
- Property Insurance
- Reinsurance
- Technology Licensing & Transfer
- Technology, Internet & E-Commerce
- Toxic & Other Mass Torts

EDUCATION

- J.D. Oklahoma City University School of Law, 1976
- B.A. Central State University, 1974

MEMBERSHIPS

- Seattle-King Bar Association
- Washington State Bar Association
- Oklahoma Bar Association
- American Bar Association
- Defense Research Institute
- Washington Defense Trial Lawyers Association

Thomas M. Jones joined Cozen O'Connor in January 1986 and is Vice Chair of the firm's National Insurance Department. As Vice Chair, Tom manages 200 attorneys, nationally. Tom also heads the firm's e-discovery practice area. Tom's practice spans many areas of law, including, advertising liability, agent/broker liability, appellate practice, arson and fraud, bad faith litigation, business torts, class actions, multidistrict litigation and other consolidated claims, commercial general liability, construction liability, crisis management, directors' and officers' liability, labor and employment, environmental law, e-discovery, excess & surplus lines, fidelity and surety, insurance coverage in the first and third party context, medical device and drug litigation, personal lines, products liability, property insurance, punitive damages, reinsurance, securities, security and premises liability, technology and e-commerce, and toxic and other mass torts.

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

Tom has authored several published articles including:

- "Insurance Issues for the Insurer," (supplement) *Washington Real Property Deskbook*, Ch. 135, Washington State Bar Association, 3d Edition, 2001 (environmental issues);
- "An Introduction to Insurance Allocation Issues in Multiple Trigger Cases," *The Villanova Environmental Law Journal*, Vol. 10, Issue 1, 1999;
- "Intellectual Property Coverage," *Insurance Coverage: An Analysis of the Critical Issues*, Continuing Legal Education Committee of the Washington State Bar Association, 1999;
- "Claims for Advertising Injury Coverage: A Primer," *Journal of Insurance Coverage*, Vol. 1, No. 4, Autumn 1998;;
- "Washington State's Insurance Regulation for Environmental Claims: An Overview of Key Provisions and Legal Issues," *Environmental Claims Journal*, Vol. 9, No. 3, Spring 1997; and
- "Reinsurance Issues Arising from the Settlement of Complex Claims," *Insurance Litigation Reporter*, Vol. 17, #12, 590, 1995.

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



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AREAS OF EXPERIENCE

- Class Action & Multidistrict Litigation
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EDUCATION

- J.D., Insert University Name, 2003
- B.S., Insert Undergraduate School, 2000

BAR ADMISSIONS

- New Jersey
- Pennsylvania

COURT ADMISSIONS

- Pennsylvania Supreme Court
- U.S. Court of Appeals for the Eleventh Circuit
- U.S. Court of Appeals for the Third Circuit
- U.S. District Court -- Eastern District of Pennsylvania
- U.S. District Court -- Middle District of Pennsylvania
- U.S. District Court -- New Jersey
- U.S. Supreme Court

MEMBERSHIPS

- American Bar Association, Equal Employment Opportunity Law Committee
- Philadelphia Bar Association

AWARDS

- Super Lawyer

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

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

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

Sarah is admitted to practice in Pennsylvania and New Jersey. She is a member of the Equal Employment Opportunity Law Committee of the American Bar Association and a member of the Philadelphia Bar Association. She is a frequent lecturer at the annual PBI Employment Law Institute and often speaks to client groups on how to address discrimination and harassment issues in the everyday workplace. She also serves as a member of the board of directors of St. Agnes Medical Center. Sarah has been selected a Pennsylvania "Super Lawyer" by her peers, appearing in



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PUBLICATIONS

- *Cozen and O'Connor Attorneys Address Employment Law Issues*
- *Cozen and O'Connor Labor Attorney Urges Employers to Take a Proactive Approach applicable*

Philadelphia magazine and *Pennsylvania Super Lawyers*.

PBI Employment Law Institute Presentations:

- 2006 - Difficult Issues in Retaliation Claims
- 2005 - Successful Strategies for Managing Employment Litigation: Inside and Outside Perspectives
- 2004 - Sarbanes-Oxley Whistleblower Claims
- 2003 - Use of Experts in Sexual Harassment Litigation
- 2002 - Practical Approach to Layoffs and Reductions in Force
- 2001 - Reasonable Accommodation and Disability-Related Inquiries under the Americans with Disabilities Act



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AREAS OF EXPERIENCE

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- Directors & Officers Responsibilities & Liability
- Employee Practices Liability Coverage
- Employment Discrimination & Wrongful Discharge
- Employment Practices Litigation Defense
- Environmental Litigation
- General Liability
- Healthcare Litigation
- Labor & Employment Litigation
- Life Science & Medical Device Litigation
- Long Tail/Toxic
- Medical Malpractice
- Personal Lines
- Premises & Security Liability
- Products Liability
- Professional Liability
- Punitive Damages
- Real Estate Litigation
- Technology Licensing & Transfer
- Technology, Internet & E-Commerce
- Toxic & Other Mass Torts
- Trucking Litigation
- Trusts & Estates Litigations

EDUCATION

- J.D. Arizona State University College of Law, 1991
- B.S. Pennsylvania State University, 1987

John F. Mullen joined the firm in March 1992 and practices in the Philadelphia office, where he concentrates his practice in insurance, third party and commercial litigation with a focus on products liability, toxic tort and employment areas.

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

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

He has significant additional experience in commercial, insurance, and trust and estates litigation. He has handled a variety of matters in the banking, pharmaceuticals, aviation, leather processing, packaging equipment and non-profit fields.

John is a board member of the World Affairs Council of Philadelphia. Additionally, he is a member of the Pennsylvania, New Jersey and Philadelphia Bar Associations. He earned his Bachelor of Science degree at Pennsylvania State University in 1987 and his law degree at Arizona State University in 1991. John was admitted to practice in Pennsylvania and New Jersey in 1991.

Memberships

- American Red Cross
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AREAS OF EXPERIENCE

- Architects & Engineers Malpractice
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- Employment Practices Litigation Defense
- Environmental Litigation
- General Liability
- General Litigation
- Healthcare Litigation
- Labor & Employment Litigation
- Legal Malpractice
- Occupational & Safety Health Administration
- Premises & Security Liability
- Real Estate Litigation
- Surety

EDUCATION

- J.D. Villanova University School of Law, 1997
- B.S. State University of New York at Binghamton, 1992
- AS in Paralegal Studies, Broome Community College, 1989

BAR ADMISSIONS

- Pennsylvania
- New Jersey
- New York

MEMBERSHIPS

- American Bar Association
- Pennsylvania Bar Association, Committee on Unauthorized Practice of Law
- Philadelphia Bar Association
- New Jersey Bar Association
- New York Bar Association

AFFILIATIONS

- President, Warwick Township Republican Club Executive Board

Julie Negovan is a Member in the General Litigation Department of the firm's Philadelphia office. She concentrates her practice in the areas of complex commercial litigation, construction litigation, professional liability, and business and securities litigation. Prior to joining the firm, Julie was an associate with Saul, Ewing, Remick & Saul LLP, in Princeton, N.J.

Julie is admitted to practice in Pennsylvania, New Jersey and New York, and before the Court Of Common Pleas for Bucks, Chester, Delaware, Montgomery and Philadelphia counties; New York Supreme Court, New York Supreme Court Appellate Division: Third Department; Superior and Supreme Courts of New Jersey; U.S. Court of Appeals for the Third Circuit; and U.S. District Court for the District of New Jersey and the Eastern, Middle and Western Districts of Pennsylvania. She is a member of the Committee on Unauthorized Practice of Law of the Pennsylvania Bar Association and the Philadelphia, New Jersey, New York and American bar associations. Julie was named a 2006 Lawyer on the Fast Track by *American Lawyer Media* and a Pennsylvania "Rising Star" by *Law & Politics*.

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



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- J.D. University of Richmond School of Law, 1995
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BAR ADMISSIONS

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COURT ADMISSIONS

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- Pennsylvania State Bar Association
- Montgomery County Bar Association

Dave Walton is a Member in Cozen O'Connor's Labor & Employment Practice Group, practicing from the firm's West Conshohocken office. He concentrates his practice in all aspects of employment litigation. He has extensive experience in litigating matters involving restrictive covenants, trade secrets, fiduciary duties and defending employers targeted by discrimination lawsuits.

Dave represents a broad range of clients from large multinational corporations to small companies, defending employers in all types of employment discrimination claims and assisting employers facing challenges posed by the information-age economy. He has lectured to attorneys and human resource professionals on wide-ranging issues in employment law, providing clients with the tools necessary to effectively manage their workforce.

Dave is admitted to practice in Pennsylvania, New Jersey and Virginia, and before the U.S. Court of Appeals for the Fourth Circuit, the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania, District of New Jersey and Eastern and Western Districts of Virginia. He is a member of the labor and employment law committees of the American and Pennsylvania Bar Associations, and the Montgomery County Bar Association. He was named a 2005 and 2006 Pennsylvania "Rising Star" by *Law & Politics*.

Dave earned his undergraduate degree from Ithaca College in 1991, where he played varsity baseball and earned numerous all-state honors. Dave earned his law degree, with honors, from the University of Richmond School of Law in 1995, where he was awarded the Sheppard Scholarship. At Richmond, Dave he served as the senior notes and comments editor of the *University of Richmond Law Review*, vice president of the negotiations board, was awarded the American Jurisprudence and Corpus Juris Secundum Book Awards for Civil Procedure, and served on the Honor Court.



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- General Liability
- General Litigation
- Insurance Coverage Claims/Litigation
- Legal Malpractice
- Professional Liability
- Professional Liability Coverage
- Securities Offerings & Regulation
- Toxic & Other Mass Torts

EDUCATION

- J.D., Villanova University School of Law, 1981
- B.A., University of New Hampshire, 1978

BAR ADMISSIONS

- Pennsylvania
- Massachusetts

COURT ADMISSIONS

- Pennsylvania Supreme Court
- Supreme Judicial Court of Massachusetts
- United States Court of Appeals for the Second, Third and Fourth Circuits
- United States District Court: for the Eastern and Middle Districts of Pennsylvania
- United States Supreme Court

AFFILIATIONS

- Defense Research Institute
- Association of Professional Responsibility Lawyers

Thomas G. Wilkinson, Jr. is a Member of the firm and resident in the Philadelphia office. He is a member of the firm's Commercial Litigation Practice Group and heads the firm's alternative dispute resolution practice. He concentrates his practice in business and securities litigation, business torts, complex environmental and insurance coverage, and professional liability matters.

Tom is a frequent lecturer and author on civil litigation and professional responsibility topics. He is the co-editor of the Pennsylvania Ethics Handbook (2d ed., 2000), a comprehensive review of the rules of conduct governing lawyers, with extensive citations to case decisions and ethics opinions addressing all aspects of lawyer-client relationships.

He was selected a "Pennsylvania Super Lawyer" by his peers, appearing in *Philadelphia Magazine* and *Pennsylvania Super Lawyers*.

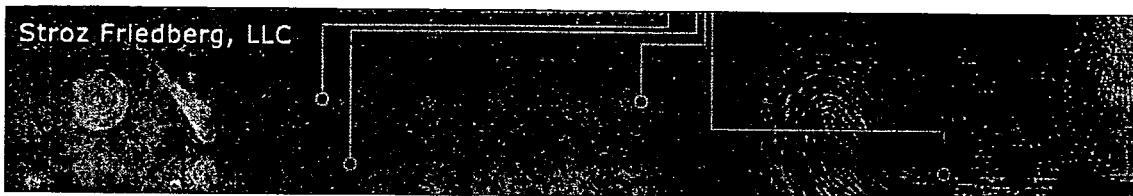
Tom is a member of the Pennsylvania and Philadelphia bar associations. He earned his bachelor of arts degree at the University of New Hampshire in 1978 and his law degree at Villanova University Law School in 1981, where he was managing editor of the *Villanova Law Review*. He served as a law clerk to the Hon. Judge Daniel H. Huyett, 3rd, United States District Court for the Eastern District of Pennsylvania. He is admitted to practice in Pennsylvania and Massachusetts, and before the United States Supreme Court and in the Courts of Appeals for the Second, Third and Fourth Circuits, as well as on motion in numerous state courts.

Professional Activities

Lecturer in Law, Villanova University School of Law
American Bar Association, Litigation Section
Pennsylvania Bar Association: Board of Governors, Past Chair, Civil Litigation Section Chair, Legal Ethics and Professional Responsibility Committee (1993-2004)
House of Delegates
Nominating Committee
Multijurisdictional Practice Task Force
Life Fellow, Pennsylvania Bar Foundation
Contributor, *Pennsylvania Lawyer and Pennsylvania Bar News*
Advisory Council, ABA Commission on Evaluation of Rules of Professional Conduct
Treasurer and Board of Directors, Pennsylvania Bar Institute
Philadelphia Bar Association: Co-Chair, State Civil Litigation Section Rules and Procedure Committee
Montgomery Bar Association
Professional Guidance Committee
Professional Responsibility Committee and various subcommittees
William J. Brennan, Jr. Award Committee
Judge, Justice Ruth Bader Ginsburg Writing Competition
Judge Pro Tem, Commerce Court
Treasurer, State Civil Litigation Section of Philadelphia Bar Association
Program Chair, Master, Villanova Law J. Willard O'Brien American Inn of Court

Awards

Special Achievement Award, Pennsylvania Bar Association (2003) for directing efforts to amend Rules of Professional Conduct
President's Award, Pennsylvania Bar Association (2002) for Leadership in Civil Litigation Section
President's Award, Pennsylvania Bar Association (2000) for Leadership in Legal Ethics and Professional Responsibility
Distinguished Service Award, Pennsylvania Bar Association (1998)
Meritorious Service Award, Philadelphia Volunteer Lawyers for the Arts



John F. Curran

John F. Curran is Managing Director and Deputy General Counsel of Stroz Friedberg, LLC, where he is responsible for supervising computer forensics, cyber-crime and private investigations, and manages many large-scale electronic discovery projects. He has led several computer intrusion investigations to determine the source of the attack and whether credit card or other identifying information was compromised. He has also led numerous computer forensic investigations involving allegations of theft of trade secrets; forgery of e-mails and e-documents; obstruction of government subpoenas; intentional spoliation; and pornography in the workplace. He was appointed as a Special Master by the United States District Court for the Eastern District of New York to oversee the review, redaction and production of sensitive government records in a class action against gun manufacturers. Mr. Curran supervises the firm's electronic discovery platform, and oversees complex white collar investigations, including those involving money laundering, securities fraud, embezzlement, and fraud for Fortune 500 companies and major law firms.

Prior to joining Stroz Friedberg, Mr. Curran served as Deputy General Counsel for National Security Affairs at the Federal Bureau of Investigation (FBI). In that role, he provided counsel to the FBI Director and other senior FBI executives regarding its counterterrorism, counterintelligence and counterespionage missions, especially concerning sophisticated electronic surveillance matters. He also represented the FBI in dealings with the Department of Justice, the Intelligence Community and Congressional staff. At the FBI, Mr. Curran supervised more than 50 attorneys and paraprofessionals assigned to the National Security Law Branch.

For more than 12 years, Mr. Curran served as an Assistant U.S. Attorney for the Eastern District of New York and held the positions of National Security Coordinator, Chief of the Violent Criminal Enterprises Sections, Chief of the Narcotics Section, and Senior Litigation Counsel. During his career at the U.S. Attorney's Office, Mr. Curran prosecuted and supervised the prosecution of terrorists and leaders of traditional and non-traditional organized crime for murder, hostage taking, kidnapping, robbery, extortion and drug trafficking. He also led comprehensive investigations into bank and accounting fraud that resulted in the collapse of American Tissue, Inc. and into obstruction of justice at the now defunct accounting firm of Andersen. In addition, Mr. Curran supervised prosecutions into securities fraud, mail and wire fraud and identity theft.

In addition to his government service, Mr. Curran has extensive commercial litigation experience. As an associate at the law firm, Skadden, Arps, Slate, Meagher & Flom LLP, he handled general securities, commercial, products liability, and insurance coverage litigation. As a senior litigator in the international practice group of Reed Smith LLP, he worked on a variety of complex matters in federal and state courts, including employee termination litigation, theft of trade secrets, as well as white collar criminal matters.

Mr. Curran served as a law clerk to the Honorable John E. Sprizzo of the United States District Court for the Southern District of New York. He received his B.A., *summa cum laude*, and his J.D., *magna cum laude*, from St. John's University in New York.

William Saffady is a Professor at the College of Information and Computer Science, Long Island University. He is the author of over three dozen books and many articles on information management topics, including records management, electronic document imaging, information storage technologies, and library automation. His latest book, *Records and Information Management: Fundamentals of Professional Practice* was published by the Association of Records Managers and Administrators (ARMA International) in 2004. He recently completed a book on managing digital documents, which will be published in 2007 by ARMA International. In addition to teaching and writing, Dr. Saffady serves as a consultant, providing training and analytical services, to corporations, government agencies, and other organizations.



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REVIEW OF NEW RULES
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A

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

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

* * * * *

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

- (1)** to join other parties and to amend the pleadings;
- (2)** to file motions; and
- (3)** to complete discovery.

The scheduling order also may include

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

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

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

* * * * *

Committee Note

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

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

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

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

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

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

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

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

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

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

* * * * *

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

* * * * *

(2) Limitations.

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

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

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

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

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

* * * * *

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

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

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

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

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

* * * * *

(f) Conference of Parties; Planning for Discovery.

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

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

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

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

* * * * *

Committee Note

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

outset may avoid later difficulties or ease their resolution.

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

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. See *Manual for Complex Litigation (4th)* § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. See Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or

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

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

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

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

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

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

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

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged

information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection — sometimes known as a “quick peek.” The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements — sometimes called “clawback agreements”— that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

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

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

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

Rule 33. Interrogatories to Parties

* * * * *

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

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

Committee Note

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

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

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

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

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

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

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

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

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

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

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

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

- (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;
- (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained

or in a form or forms that are reasonably usable;

and

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

* * * * *

Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically

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

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

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

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

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

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

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

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

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

amended to ensure similar protection for electronically stored information.

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

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

to call for discussion of the form of production in the parties' pre-discovery conference.

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

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

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

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

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

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

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

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

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

* * * * *

Committee Note

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

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

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

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

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

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

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

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

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

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

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

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

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

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

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

(2) A subpoena must issue as follows:

* * * * *

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

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

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

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

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

(b) Service.

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

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

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

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

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

(c) Protection of Persons Subject to Subpoenas.

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

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

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

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

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

inspection, copying, testing, or sampling commanded.

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

(i) fails to allow reasonable time for compliance;

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

FEDERAL RULES OF CIVIL PROCEDURE

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

(iv) subjects a person to undue burden.

(B) If a subpoena

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

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

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

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

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

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

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

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

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

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

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

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

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

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

Committee Note

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

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

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

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

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

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

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

Form 35. Report of Parties' Planning Meeting

* * * * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate

paragraphs or subparagraphs as necessary if parties disagree.]

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

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

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order).


All discovery commenced in time to be completed by _____ (date) _____. [Discovery on ____ (issue for early discovery) _____ to be completed by _____ (date) _____.]

B

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

November 14, 2006
Cozen O'Connor


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**Pending Amendments
Cover Five Related Areas**


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

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



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

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



The Proposed Amendments

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



The Proposed Amendments (cont.)

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



Early Attention to E-Discovery Matters, Disclosures

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



The Meet and Confer Proposals

Rules 26(a) and 26(f)

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



Meet and Confer Proposals (cont.)

Rule 16(b)

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




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

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




Conforming Amendments to Rule 33(d)

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




The "Form" of Information is Dynamic

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



Rule 35

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



Changes to Rule 45

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





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PRESERVATION OF EVIDENCE AND AVOIDING SPOILIATION SANCTIONS

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Preservation of Evidence and Avoiding Spoliation Sanctions

Presented by: John Mullen, Esq.
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Sanctions

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



Sanctions

- Adverse Inferences
 - Content of deleted emails; against interest (Morgan Stanley)
- Exclude Evidence (witnesses, documents)
- Direct Verdict
- Attorney Professional Sanctions (intentionally deleted client files)
- Separate Civil Cause of Action
- Criminal (bankruptcy)



Preservation/Avoiding Sanctions

- Build e-discovery into litigation management requirements (reporting/budget).
- Litigation Hold (cease deletions and overwriting; freeze data; clear written instructions to client) (repeat....).
- Authorize counsel to meet with key players and IT specialists to implement Hold. (avoid bad faith).



Preservation/Avoiding Sanctions

- Ensure counsel understands e-discovery rules, client's network/computer system and retention policies.
- Collect information as early as possible.
- Oversee ongoing compliance with Litigation Hold.



Last Thoughts

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



Last Thoughts

- Negotiate agreement or petition Court
- Higher costs (client and carrier time; attorney and consultant fees).
- Higher risks (liability (fishing)/bad faith).





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PRODUCTION OF NOT REASONABLY ACCESSIBLE DATA

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Production of Not Reasonably Accessible Data

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Rule 26(b)(2)(B) – The Two-tier System

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



Rationale of the Rule

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



Sources of Data

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



Two Types of Data

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

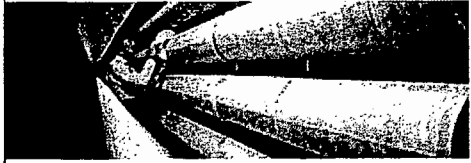


"not reasonably accessible"

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



The future may not look like this



Substantial Effort

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



Undue Cost

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



**Responding to an ESI Request
Which Includes Inaccessible Data**

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



**Good Cause Supporting
Production of Inaccessible Data**

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



Burdens

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



Compromises

- Sampling inaccessible data
- Cost sharing
- Cost shifting





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COST-SHIFTING: WHO PAYS FOR ALL OF THIS?

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Cost – Shifting: Who pays for all of this?

Presented by: Sarah Kelly, Esq.
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Cost of E-Discovery:

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



Rule 26 (b)(2)(B)

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

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

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



Comment to Rule amendment:

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



Comment, cont'd

Presumption

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



Comment, cont'd

Upon motion (to compel or for protective order)

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



Comment, cont'd

Consideration for determining motions:

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



Comment, cont'd

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



Comment, cont'd

Court may order discovery in order to decide motion!

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



Comment, cont'd

Court may:

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



Comment, cont'd

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

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



Comment, cont'd

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



Sedona Principles:

- If e-discovery burdens are not made proportional to amount in controversy and nature of case, transaction costs will overwhelm ability to resolve disputes fairly.

- This includes consideration of :
 - costs of attorney time for review
 - non-monetary costs such as privacy of business data, legal privileges and the like
 - secondary costs, such as burden on IT personnel



Zubulake factors

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



Zubulake factors cont'd

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



Zubulake factors cont'd

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



Rule 45: Cost-shifting in Third Party Discovery

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



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

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



Costs in some cases

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

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



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

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



The Cutting Edge of ESI: Cost-Containment

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



Cost-Containment, cont'd

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



Cost-Containment, cont'd

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



Cost-Containment, cont'd

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



COST EFFECTIVE APPROACHES FOR LOCATION RESPONSIVE AND RELEVANT DATA

written and presented by:

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**E-Discovery:
Cost Effective Approaches to Electronic
Discovery Under the Federal Rules**

November 14, 2006

John F. Curran
Managing Director & Deputy General Counsel
Stroz Friedberg, LLC

www.strozfl.com

Stroz Friedberg, LLC

IDENTIFYING THE DATA

- ✓ Laptop/Desktop
- ✓ Home Computer
- ✓ Server-based e-mail box
- ✓ Server-based "home directory"
- ✓ Server-based "group shares"
- ✓ Server-based e-mail box from back-up tapes
- ✓ Server-based files from back-up tapes
- ✓ Personal Digital Assistant
- ✓ Floppies, CDs, DVDs

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ACTIVE FILES

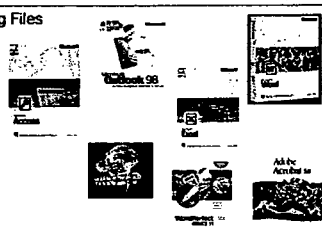
- User-created files and e-mails
- Found in directories the user can access such as My Documents, Inbox, Sent Items, Deleted Items, Home Directory

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ACTIVE FILES

- ✓ Word Processing Files
- ✓ Spreadsheets
- ✓ Database Files
- ✓ E-mails
- ✓ Text Files
- ✓ PowerPoints
- ✓ Pictures
- ✓ PDFs
- ✓ Faxes
- ✓ CAD drawings



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METADATA

- System or application-created data that tells you about files and e-mails
- Not visible on surface of document

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E-DOCUMENT METADATA

- "Author"
- Created Date
- Last Accessed Date
- Last Modified Date
- Last 10 Authors"
- Edit History/Track Changes
- Revision Number
- Last Printed

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DECREASE VOLUME

- ✓ Filter out duplicates: "de-duplication"
- ✓ Filter out certain dates
- ✓ Filter out system files (.dll), extraneous file types (.jpg)
- ✓ Filter in specific file types (.doc, .xls, .pst, .pdf, .ppt, etc.)
- ✓ Focus on relevant users

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HURDLES

- Crack password-protected files
- Decrypt encrypted files
- Unhide hidden files
- Explode compressed files (.zip)
- Detect re-named file types
- Search foreign language characters
- Convert non-searchable PDFs

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TECHNIQUES

- Print and review manually
- Review "native" electronic files
- Convert to .tiff/.pdf, upload into litigation support database
- Native files or converted .tiffs/.pdfs uploaded into web-based viewer
- Many major cases have 10-20+ attorneys, paralegals, contract attorneys reviewing E.D.

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NATIVE FILE REVIEW

- Meaning: Files Produced In the Same Format In Which They Were Created. No Conversion.
- Manual, Inefficient, Insecure Process
- Difficult to Coordinate Review by Multiple Esqs.
- User Can Alter Data, Metadata
- Can't Bates Stamp
- Can't Redact Effectively
- Edit Histories Can Be Revealed

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LITIGATION SUPPORT DATABASES

 **SUMMATION** *@matrix* *Concordance*

- ✓ Convert data to "load file"
- ✓ "Load file" uploaded into review tool
- ✓ Review tool hosted on a law firm server
- ✓ Less functionality and capacity than on-line review tools
- ✓ Can key-word search
- ✓ Can redact
- ✓ Can drag privileged documents to folders
- ✓ Can establish hot-document folders
- ✓ Can keep track of many review tasks

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WEB-BASED E.D. VIEWERS

- Upload data in native/tiff/pdf form
- Access data through any secure Internet browser (<https://>)
- Many simultaneous connections from multiple locations
- Can bates stamp
- Can redact
- Can drag privileged documents to folders
- Can establish hot-document folders
- Can keep track of many review tasks
- Can print locally or at hosting site

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THE NEW SAFE HARBOR PROVISION
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**E-Discovery Amendments to the Federal Rules
of Civil Procedure –
Are You Prepared?**

Marriott Financial Center Hotel
New York, NY
November 14, 2006

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Rule 26(b)(2)(B)

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




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



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


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

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



Rule 37(f) – Safe Harbor

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



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



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



Rule 37(f)

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



Rule 37(f)

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



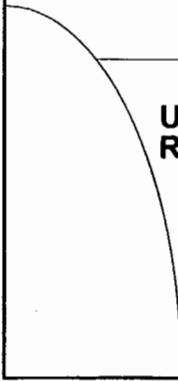
Rule 37(f)

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



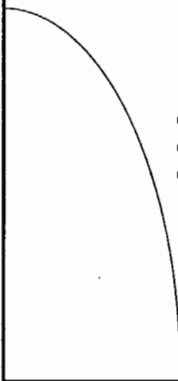
UPGRADING YOUR RECORD RETENTION POLICY

written and presented by:
Bill Saffady, Professor
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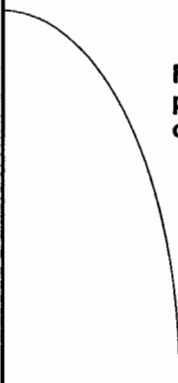
Upgrading Your Record Retention Policy

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Introduction

- Purpose of this session
- Purpose of record retention policies
- Relationship to electronic discovery
 - ◆ Identifying electronic records
 - ◆ Explaining the unavailability of electronic records
 - ◆ Implementing litigation holds



From a record retention perspective there are 2 types of information bearing objects

- Records
- Non-records

From a record retention perspective there are 2 types of records

- Official copies
- Duplicate records

Requirements for a legally-acceptable record retention policy

- Systematically developed and implemented in regular course of business
- Fully compliant with applicable laws and regulations
- Reasonable retention periods
- Encompasses records in all formats: paper, photographic, electronic
- Specifies retention requirements for official copies
- Provides retention guidance for duplicate records, drafts, working papers, notes

Basic retention principles

- Records will be retained as long as needed to satisfy legal and operational requirements
- Records will be destroyed promptly when retention periods elapse
- Records required for litigation or other legal matters will be preserved

Requirements for a workable retention policy for electronic records

- Highly prescriptive and easily understood
- Practical guidance that can be implemented
- Compatible with information technology infrastructure
- Provides reasonable assurance that records will be accessible when needed
- Considers interrelationship of electronic records and paper documents
- Includes provisions to ensure compliance, preservation of evidence

Unstructured electronic records: the biggest retention challenge

- Email
- File shares
- Web pages on public Internet or organizational intranets
- SharePoint or other collaborative sites
- Blogs
- Files on local hard drives

Action steps

- Evaluate existing retention policies and practices for electronic records
- Identify required modifications and improvements
- Draft new or revised policies
- Obtain approvals
- Establish reasonable implementation timetable



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STATE COURT RULES AND THE NCSC'S PROPOSED GUIDELINES

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2006 E-Discovery Seminar:
 E-Discovery Amendments to the Federal Rules of Civil Procedure – Are You Prepared?
 November 14, 2006
 David J. Walton, Esq.
 Joy F. Grese, Esq.

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

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

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

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

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

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

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



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