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U.S. JUDICIAL CONFERENCE CONSIDERS E-DISCOVERY RULES

by

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Proposed amendments to the Federal Rules of Civil Procedure governing discovery of electronically stored information (“ESI”) have been approved by the Standing Committee on Rules of Practice and Procedure of the U.S. Judicial Conference and will be considered by the full Conference on September 20, 2005. If the Conference approves, the amendments will be forwarded to the U.S. Supreme Court. If promulgated by the Court by May 1, 2006, the amendments will take effect on December 1, 2006, unless Congress intervenes.

Virtually unanimous approval of the amendments by the Standing Committee bodes well, but approval by the Judicial Conference cannot be assumed. Although the Conference has seldom failed to support the recommendations of its distinguished Rules Committee, electronic discovery is a complex subject and certain of the amendments have drawn the opposition of some elements of the plaintiffs’ bar and special interest “consumer” groups. On the whole, however, bench, bar, and academia have supported the amendment package because it is balanced, moderate, and will provide helpful guidance in a very difficult area. *See generally, Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Sept. 2005 (“Report”).*

The amendments strike a careful balance among a variety of views and in many key areas have captured the middle ground, which, while not solving all problems, will help to redress the current imbalance in e-discovery and will contribute to reducing its burdens, costs, and uncertainty. In a number of instances, choices the Committee made were contrary to positions espoused by defense and corporate counsel. For example, it was argued that there should be no reference to preservation obligations; no identification obligation for inaccessible information; that Rule 34 should speak only in terms of “reasonably usable” forms of production; and that Rule 37(f) should give clearer, more predictable, bright line protection. Yet, notwithstanding the many compromises, the amendments should advance the essential purposes of the Federal Rules and bring e-discovery closer to the mandate of Rule 1 and within the bounds of proportionality and balance toward which discovery has been trending over the past twenty years.

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The Standing Committee and its Civil Rules Advisory Committee have heard and examined viewpoints from a wide spectrum of interested parties throughout an intensive multi-year study and debate. The Standing Committee Report noted that the Advisory Committee first heard about problems with computer-based discovery in 1996. In 1999, the then-chair laid out the advisory committee's daunting mission to devise "mechanisms for providing full disclosure...where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties..." The advisory committee began intensive work on the subject in 2000. *Report* at 3.

The Report also points out that many bar organizations, attorneys, computer specialists, and members of the public informed the rulemaking process. Study of the issues brought together lawyers, academics, judges, litigants, and experts in information technology with a variety of experiences and viewpoints. Three public hearings were held at which 74 witnesses testified and an additional 180 written comments were submitted.

Discovery of Electronically Stored Information ("ESI") is Unique. The Report also highlights the unique character of e-discovery, which raises markedly different issues from conventional discovery of paper records. ESI is characterized by exponentially greater volume than hard-copy documents. Unlike paper, computer information is also dynamic; merely turning a computer on or off can change the information it stores. And, ESI, unlike words on paper, may be incomprehensible when separated from the system that created it. These and other differences are causing problems in discovery that the rule amendments can helpfully address.

The Rules Committee's lengthy study revealed that the discovery of ESI is becoming more time-consuming, burdensome, and costly. The current discovery rules, last amended in 1970 to take into account changes in information technology, provide inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations. Developing case law on e-discovery is not consistent and is necessarily limited by the specific facts. Disparate local rules have emerged to fill the gap between the rules and practice, and more courts are considering local rules. Without national rules adequate to address unique e-discovery issues, a patchwork of rules and requirements is likely to develop. While such inconsistencies are particularly confusing and debilitating to large public and private organizations, the uncertainty, expense, delays, and burdens of such discovery also affect small organizations and individual litigants.

Placing Electronic Discovery in Historical Perspective. The Report properly frames the proposals and the debate they have engendered in the appropriate historical context — a framework and architecture established by prior rule amendments over the last twenty years. Before the civil rules became effective in 1938, discovery was extremely limited. The 1938 civil rules provided for liberal discovery, further expanded by amendments in 1946 and 1970, the "high water mark of liberal discovery." Since then, as the Report observes, the discovery rules have been amended in 1980, 1983, 1993, and 2000 to provide more effective means for controlling overuse and occasional misuse of the discovery devices. *See Report* at 5-6.

The present e-discovery proposals grew out of and share the same focus as the Rules Committee's work on the 2000 amendments, which focused on the "architecture of discovery rules" to determine whether changes could be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management when appropriate.

The Proposed Amendments. The Rules Committee concluded that it would be counterproductive to delay implementing the amendments in the vain hope that amassing yet more information and testing additional formulations would result in significant improvements. Prolonged re-argument of old issues would result and delay meaningful relief for many more years. Therefore, they recommended meaningful e-discovery amendments in five areas, which are summarized below in the order presented in the Report.

Discussion of E-Discovery Issues in Early Discovery Planning. The proposed amendments to Rule

16, Rules 26(a) and (f), 45, and Form 35 present a framework for the parties and the court to give early attention to issues relating to electronic discovery, including the frequently recurring problems of the preservation of evidence and the assertion of privilege and work-product protection. *See Report* at 7-8.

Rule 16 is amended to invite the court to address the disclosure or discovery of ESI in the Rule 16 scheduling order. The amendment also gives the court discretion to enter an order adopting any agreements the parties reach for asserting claims of privilege or work product protection after inadvertent production in discovery.

The proposed amendment to Rule 26(a) clarifies a party's duty to include in its initial disclosures electronically stored information by substituting "electronically stored information" for "data compilations."

Under the proposed amendment to Rule 26(f), the parties' conference is to include discussion of any issues relating to disclosure or discovery of ESI. The topics to be discussed include: the form of producing ESI, a distinctive and recurring problem in e-discovery; preservation issues, which have new importance because of the dynamic character of electronic information; and whether the parties can agree on approaches to asserting claims of privilege or work-product protection after inadvertent production.

The proposed amendment to Rule 45 conforms the provisions for subpoenas to changes in the other e-discovery rules and Form 35 is amended to add the parties' proposals regarding disclosure or discovery of ESI to the list of topics to be included in the report to the court.

Clarifying and Conforming Proposed Amendments to Rules 33 and 34. The proposed amendment to Rule 33 provides that a party may answer an interrogatory involving review of business records by providing access to ESI if the burden of finding the answer is substantially the same for either party.

The proposed amendment to Rule 34 explicitly recognizes ESI as a category subject to discovery that is distinct from "documents" and "things" to clarify that there are differences among them important to managing discovery. Rule 34 is also amended to authorize a requesting party to specify the form of production and for the responding party to object. Absent an order, agreement, or a request for a specific form, a party may produce responsive ESI only in one form — the form in which the party ordinarily maintains it or in a reasonably usable form. *See Report* at 8-9.

Addressing Inadvertent Privilege Waiver — Proposed Amendment to Rule 26(b)(5). The proposed amendment to Rule 26(b)(5) provides a procedure for asserting privilege after production that is parallel to the similar proposals for Rules 16 and 26(f). The volume of ESI searched and produced in response to discovery can be enormous, and certain features of the forms in which such information is stored make it more difficult to review for privilege and work-product protection than paper. Thus, the inadvertent production of privileged or protected material is a substantial risk. *See Report* at 10-11.

Under the proposed amendment, 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 disclosed the information before being notified, the receiving party also must 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 a waiver has occurred.

Two-Tier Discovery: Proposed Amendment to Rule 26(b)(2). The proposed amendment to Rule 26(b)(2) would require a court order for production of ESI that is "not reasonably accessible because of undue burden or cost." The proposal recognizes a "distinctive, recurring problem" in e-discovery and builds on existing rules to facilitate early production of relevant and accessible ESI. And, it specifically references the 1983 proportionality amendments first empowering judges to limit or forbid discovery where costs and burdens outweigh benefits, explicitly implemented in the adoption of "two-tier" discovery in the 2000

amendments. *See Report* at 11-13.

The amendment requires the responding party to identify, “by category or type,” the sources of potentially responsive information that it has not searched or produced because of the costs and burdens of accessing the information. If the requesting party moves for production of such information, the responding party has the burden to show that the information is not reasonably accessible. Even if the responding party makes this showing, a court may order discovery for good cause, “considering the limitations of Rule 26(b)(2)(C),” and “may specify conditions for the discovery.” Such 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.” *See Committee Note* at 45, 48.

The proposed amendment codifies the best practices of parties and courts with experience in these issues. By creating the distinction between “not reasonably accessible” and “accessible” ESI, burdensome production that cannot be justified by the needs of the case should be reduced significantly.

Sanctions — Proposed Amendment to Rule 37(f). Under the addition to Rule 37: “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.” *Committee Note* at 83.

The proposed rule recognizes that all electronic information systems are designed to recycle, overwrite, and change information in routine operation, even without “specific direction or awareness,” not because of any relationship between the content of particular information and litigation, but because they are necessary functions of regular business operations. *Committee Note* at 84. The proposed rule also recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome, again in ways that have no counterpart in managing “static” hard-copy information. *Report* at 13-14.

Even when litigation is anticipated, it can be very difficult to interrupt or suspend the routine operation of computer systems to isolate and preserve discrete parts of the information they overwrite, delete, or update on an ongoing basis, without creating problems for the larger system. Routine cessation or suspension of these features of computer operation is also undesirable; the result would be even greater accumulation of duplicative and irrelevant data that must be reviewed, making discovery more expensive and time-consuming. *Id.*

However, sanctions are not avoided simply by showing that information was lost by routine operation of an information system. It also must be shown that the operation was in good faith. One factor in the good faith determination may involve intervention to modify or suspend certain features of a system’s routine operation to prevent the loss of information, if that information is subject to a preservation obligation. When and if such an obligation arises depends on the substantive law and the circumstances of each case; the amendment does not create a new preservation obligation. *See Report* at 15-16.

The logic behind the proposal is that the cost and disruption of interrupting routine computer systems are not justified when there exist other means for preserving necessary and relevant information, such as: a “litigation hold” process, early discussion of the need for such extreme preservation measures, and entry of preservation orders tailored to the specific case. The proposed rule should provide necessary guidance in a troublesome area distinctive to electronic discovery.

Conclusion. The amendments are a well integrated and balanced rules package that will be a major step towards a more realistic approach to electronic discovery that should significantly reduce its costs and burdens and improve its effectiveness. A nice balance has been struck between a level of generality to accommodate future technological changes and sufficient specificity to provide necessary guidance. Everyone with a stake in a fair and efficient civil justice system should look forward to their approval by the Judicial Conference with a recommendation that they be adopted by the Supreme Court and transmitted to Congress.