

## DEVELOPMENT OF NEW FEDERAL “E-DISCOVERY” RULES ADVANCING

by

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The Civil Rules Advisory Committee of the U.S. Judicial Conference has been considering, for several years, whether or not to propose further amendments to the Federal Rules of Civil Procedure to deal with the increasingly severe problems of discovery of computer-based information, known colloquially as “E-Discovery.” Now, the Committee is at the point of debating a “first cut” of specific rule amendment proposals to supply needed guidance to practitioners and litigants.

The preliminary proposals were discussed extensively at the Committee’s meeting on October 1 and 2, 2003. A “refined” set of proposals will be prepared by the Committee’s Discovery Subcommittee reflecting the input received at the meeting and will be the subject of intensive review at a Conference the Committee has organized to be held at Fordham Law School on February 20-21, 2004.

Emblematic of the Committee’s thorough approach are two memoranda analyzing seven issues involved in making rules in this important, complex and difficult area. A Discovery Subcommittee Report, dated April 14, 2003, prepared by the Subcommittee Chair, Prof. Myles V. Lynk, and Prof. Richard L. Marcus, Subcommittee Reporter, and a detailed September 15 memorandum to the full Committee drafted by Professor Marcus that presented “first cut” proposals in each area were the basis of the discussion on October 1 and 2.

As has been its recent practice, the Committee’s action has been and will continue to be informed by substantial and continuing input from the Bar. The Subcommittee’s April Report notes that during consideration of the 2000 discovery amendments in the late 1990s, lawyers repeatedly told the Committee that problems with discovery of electronically-stored information was an area that urgently needed attention, and that the difficulties presented by this form of discovery could, in some cases, dwarf the problems with hard-copy discovery on which the Committee was then focused.

Since that time, the growth in electronic discovery has been staggering and many practitioners have supplied the Rules Committee with in-depth guidance in identifying the many problems associated with such discovery, and specific suggestions for rule amendments that would help solve those problems. *See, e.g.,* Cortese & Wolfe, *Electronic Discovery: Problems and Solutions*, THE METROPOLITAN CORPORATE COUNSEL

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(Vol. 8, No. 4, Apr. 2000); Allman, Comment on Current Electronic Discovery Issues to Judicial Conference Committee on Rules of Practice and Procedure (Dec. 9, 2002).

As the frequent expressions of concern about E-Discovery did not abate and continuing education and practice programs on the subject became more frequent, the Discovery Subcommittee undertook an in-depth study of the nature of the issues raised and the range of possible solutions, culminating in its April 14 Report and Professor Marcus' "first cut" draft rules of September 15. The full Committee endorsed the Report at its May, 2003 meeting and debated the draft rules at its October meeting in the following seven areas:

**1. Definition of the Subject.** This was not one of the seven areas in the April Report, but was included in the rule draft so that a single phrase could be invoked throughout the discovery rules to avoid confusion. There was little discussion of what to call the subject, although "electronically stored *information*" might be an improvement over "*data*". Debate correctly focused instead on the "Scope" definition amid concerns that such a broad definition went beyond the structure and purpose of the discovery rules, the scope of discovery as cabined by Rule 26(b), and the Committee's rulemaking power under the Rules Enabling Act.

**2. Including Discussion of E-Discovery Issues in the Early Discovery Planning — Rule 26(f), Rule 16(b), and Form 35.** Rule 26(f) requires that counsel confer before formal discovery commences and develop a discovery plan (Form 35) that is submitted to the judge before entry of the Rule 16(b) order. There was general support for straightforward amendments to Rule 26(f) and Form 35 that could improve the handling of E-Discovery problems; and, as well, on an amendment to Rule 16(b) adverting to inclusion of directives about these topics in the initial scheduling order.

Although early drafts contained considerable detail about topics to be discussed at the conference, the Committee seems appropriately to favor a more general description of the topic, for example, by adding a new subparagraph: "(C) whether any party anticipates disclosure or discovery of electronically-stored data, and if so what arrangements should be made to facilitate management of such disclosure or discovery". The details as to the topics should be addressed in the Note. This avoids the unnecessarily prescriptive "cart before the horse approach" of, for example, a new Local Rule adopted on October 6 by the New Jersey Federal District Court that imposes extensive duties "to investigate and disclose" ... computer based information" on counsel before any request for such information has been made. See Local Civil Rule 26.1(d) at <http://pacer.njd.uscourts.gov/Rules> tab.

**3. Definition of Document — Rule 34.** Rule 34, "Production of Documents and Things," states that a request may seek "data compilations from which information can be obtained." Rule 26(a) (1) (B), "Initial Disclosures," similarly refers to "data compilations." Although there is little disagreement that these descriptions include E-Discovery, the Committee is considering amending the rules to include a more modern and accurate definition of the various types of digital information.

In fact, the Rules probably should *not* contain overly specific definitions of electronic documents. Certainly not for the production of metadata and embedded data, which raise very difficult and technologically complex definitional and preservation issues. There is, simply, no clear, uncomplicated or agreed definition of "metadata," or "embedded data." As to preservation, must every version of a document, including "metadata" and embedded data, be preserved? How? When? Why, if it serves no business purpose and is unrelated to a preservation order in a particular case? Such requirements would go far beyond the appropriate reach of the Federal Rules of Civil Procedure and should be left to determination in specific cases.

Therefore, a common sense approach to the definition of "documents and things" that should be acceptable to most lawyers and litigants would be to add a few words to Rule 34(a) (1) to confirm that it covers electronic information, perhaps as follows: "...any designated documents (including ...other **data or data compilations in any form** from which information can be obtained ... which constitute or contain matters within the scope of Rule 26(b)...." (New words in **bold**.) This is clearly an area in which the Committee would welcome additional input and guidance.

**4. Form of production. (a) Documents.** At the October meeting, discussion seemed to favor a mandatory approach that required the requesting party to specify the form of production as a better way to set up discovery and to focus on the information that is relevant and material in the case at issue, such as the

following: “Rule 34 ... (1) Form of the Request.... (D) specify the form in which electronically-stored documents are to be produced. Additional proposed amendments to Rule 34 (b) (2) would explicitly provide the producing party the opportunity to object to the requested form, to produce the electronic materials in the form in which they are ordinarily created or stored, and to produce the materials only in one form unless the requesting party shows good cause for production in another form.

Such amendments should foreclose satellite litigation over the form of production of electronic information and reduce the cost and burden of often duplicative discovery requests. They would satisfy the need of the court and litigants to resolve form of production issues early on before costly and burdensome production is made. In addition, they recognize the producing parties’ right to exercise discretion to store electronic information in multiple formats. This is another area in which the Committee would appreciate additional guidance and real world experience.

**(b) Interrogatories.** The Committee discussed proposed amendments to Rule 33 that would permit the option of producing electronic information in response to an interrogatory and that would require “giving the requesting party sufficient information to enable it to derive or ascertain the desired information.” However, there is probably no need for a separate provision in Rule 33 on this topic. Only a few words need be added to existing Rule 33 to clarify that it applies to information maintained electronically.

The Committee appears rightly to have rejected an earlier proposal that had the option to make records available automatically requires the turning over of software. For various reasons, including proprietary issues and the broader issue of the scope of the Rules themselves, whether software should be produced should be resolved as a question of whether the producing party has or has not made the information available in individual cases within the scope and protections of Rule 26.

**5. Addressing the Producing Party’s Burden of Retrieving, Reviewing, and Producing Data it Does Not Ordinarily Access.** Getting to the heart of the concerns expressed in numerous comments to the Committee, the April 14 Report and the September 15 draft recognized that: automatic computer backup systems routinely preserve large amounts of data that is never intended to be used absent a catastrophic event; are not likely to be organized in a way that facilitates locating materials on a specific topic; the effort to review the data may be very costly without yielding information of significant value; and materials thought to have been “deleted” (including “legacy data”) may be retrieved by forensic computer operations, but at great cost.

Therefore, the Committee discussed specific rule amendments to deal with the specialized aspects of “extraordinary efforts” production, beyond the generalized requirements of Rule 26(b) (2), which addresses such concerns by directing the court to limit or forbid discovery if its cost is disproportionate to the likely value of information that would be generated. The discussion highlighted the huge dimensions and importance of the problem particularly to multinational litigants, with numerous systems dumping enormous amounts of data daily on to back up systems, which are exceedingly difficult to restore and search. The direction seemed clear — there is no need to get at electronic information unless it is reasonably accessible in the ordinary course of business and within the scope of Rule 26(b) and — unless ordered to do so.

A number of Committee members cautioned against expanding the scope of discovery by whatever is done in this area, merely because it relates to electronic data. They indicated that the Committee was just beginning to understand the dangers here, not only of exceeding the scope of discovery, but of exceeding their rulemaking power. Thus, a modest approach within the scope of the Rules and which would include the protections such as the “cost/benefit analysis” of Rule 26, would be to amend the Rules by adding something like the following provision:

In responding to discovery requests for electronically-stored data a party must produce responsive information within the scope of Rule 26(b) that is reasonably accessible in the ordinary course of business. The court may order a party to produce electronically-stored data that is not created or stored in the ordinary course of business only for good cause subject to the limitations and protections of Rule 26.

In addition there should be explicit discussion in the Note on such a new rule about the need to consider, in specific cases applying Rule 26, the extraordinary efforts and costs of preservation, production, and review

of materials not kept in the ordinary course of business.

**6. Addressing Inadvertent Privilege Waiver. (a) The “Quick Peek” Approach.** The Report and the Draft noted that the difficulties presented by inadvertent waiver of privileges had long been on the Advisory Committee’s agenda, alternative drafts having been prepared during consideration of previous discovery rule amendments. Designing a solution to the waiver of privilege problem for E-Discovery is even more complex and the Committee will proceed with caution. Concern was expressed about whether privilege issues should be addressed in the Rules at all. It also was noted that recent comments had raised serious concerns over procedures such as the “quick peek.”

There is a long history of concern over the federal courts’ power to affect what are mostly state law privileges that is heightened in the context of the Rules Enabling Act and which caused the Advisory Committee to shelve earlier “quick peek” proposals. Moreover, although it was noted that such a procedure is happening in practice, it occurs by agreement pursuant to stipulation, it may not be possible or appropriate for the rules to require it, and even a stipulation does not offer much protection.

**(b) Inadvertent Production.** There were calls for more information on this subject in order to determine if the Committee could come up with a sound rulemaking approach, noting that the pressure on the system of the high cost of privilege review under ordinary circumstances has been amplified by the huge increase in the volume of electronic data.

Return of documents and maintaining confidentiality do not offer adequate protection once the “cat is out of the bag,” in addition to increasing the pressure for “un-reviewed production.” Therefore, the Committee seemed to favor what was characterized as a more aggressive approach that would codify in a new Rule 34(b) (2) (E) the majority view on inadvertent production. Such a rule would summarize the factors most courts have applied in deciding whether to hold that a given disclosure should be regarded as waiving the privilege. *See* 8 FED. PRAC. & PROC. § 2016.2 at 242-45.

**7. Adopting a “Safe Harbor” for Preservation of Electronic Data.** Finally, the Report and Draft dealt with what had been characterized as “a preservation protocol” to deal with the concerns of both plaintiffs and defendants regarding preservation of electronic information. At present, there is a great deal of uncertainty concerning the scope of the duty of preservation for electronic materials which are not accessible in the ordinary course of business and a lack of clear standards applicable to determining whether sanctions are appropriate for failure to preserve and produce such information.

At the Committee meeting there were a number of expressions of concern about the draft “preservation obligation.” Some expressed substantive concerns, questioning whether the rules should dictate such obligations. Others suggested that it must be tied to service of a request for production of material information, i.e., what is material to the claims and defenses in a particular case. Otherwise, such an obligation could exceed the rulemaking power and constitute “regulation by litigation.” The Committee sought guidance from practitioners in sorting out the realities of preserving “electronic documents” and the “real need” for certainty in this extremely complex area.

The discussion revealed that it will be necessary to fully document the problems in this area and develop a straightforward rulemaking solution. Creating a preservation obligation for electronic documents where one does not now exist in the Rules would create more problems than it would solve. There is, however, a real need for a safe harbor provision that might be as direct as the following: “Nothing in these rules requires a party to suspend or alter the operation in good faith of disaster recovery or other electronic data systems unless the court so orders for good cause.”

**Conclusion.** The course of the Subcommittee’s efforts soon should become clear as it prepares refined proposed amendments for discussion at the Committee’s Fordham Law School Conference to be held on February 20-21, 2004. In the meantime, if you are among the many practitioners who believe that problems with E-Discovery could be alleviated if the Federal Rules of Civil Procedure contained more specific guidance with regard to any of the above areas, you should make your views known to the Committee. Comments, suggestions, proposals, etc., should be sent to Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure, Washington, D.C. 20544 ([peter\\_mccabe@ao.uscourts.gov](mailto:peter_mccabe@ao.uscourts.gov)).