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# FEDERAL “E-DISCOVERY” RULES PROPOSAL REQUIRES SCRUTINY AND COMMENT

by

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Amendments to the Federal Rules of Civil Procedure governing discovery of electronically stored information were recently published for comment by the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference. See <http://www.uscourts.gov/rules>. The proposed amendments are the culmination of several years of study by the Rules Committee and raise important questions for all practitioners who deal with the federal civil rules.

Hearings on the proposed amendments will be held in order to help the Committee decide whether to initiate the process leading to implementation, as follows: January 12, 2005 – San Francisco, CA; January 28, 2005 – Dallas, TX; and February 11, 2005 – Washington, D.C. Interested parties may request the opportunity to testify at the hearings at least one month in advance of the scheduled date by notice to: Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington D.C. 20544 (Peter G. McCabe ([peter\\_mccabe@ao.uscourts.gov](mailto:peter_mccabe@ao.uscourts.gov))). Those who are unable to testify should send comments on the proposals to the same address. The six month comment period will close on February 15, 2005 and the Civil Rules Advisory Committee will consider comments and testimony received during the period at its April 2005 meeting to decide whether or not to recommend promulgation of the amendment package subject to Supreme Court and Congressional review.

The proposals address increasingly frequent concerns expressed by many academics, judges, lawyers, and litigants about the excessive costs, burdens, and ineffectiveness associated with e-discovery, and represent positive progress toward amending the Federal Rules to establish clear and concise guidelines. The proposed amendments address five areas of concern: 1) Early attention to e-discovery issues; 2) Two-tier discovery of electronic information that is “not reasonably accessible”; 3) Procedures for asserting privilege after production; 4) Definition of document, form of production, and options for production of electronic information; and 5) A “safe harbor” from Rule 37 sanctions. This LEGAL BACKGROUNDER focuses on the proposed amendments dealing with the scope and means of production of electronic information that provide procedural reforms designed to reduce the costs and burdens of e-discovery, as well as the risk of abusive sanctions.

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## “TWO-TIERED” DISCOVERY OF ELECTRONIC INFORMATION

A key amendment would limit the obligation to preserve and produce electronically stored information that is “not reasonably accessible” without a court order. *See* Proposed Rule 26(b)(2): “A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible.” The proposal traces its lineage back to the 1983 proportionality amendments that first empowered judges to limit or forbid discovery where the costs and burdens outweighed the benefits, made more explicit in the 2000 amendments. Under the pending proposal, while discovery of electronic information that is “not reasonably accessible” could still be ordered for “good cause,” the two-tiered approach offers the practical benefit of confirming that such information need not ordinarily be preserved at the outset of litigation. This would further quash the argument that all potentially discoverable material must be preserved, regardless of its status, current use or accessibility, and thereby reduce the risk of sanctions during litigation. Moreover, by creating the distinction between “not reasonably accessible” and “accessible” electronic information, burdensome production that cannot be justified by the needs of the case should be reduced.

***Meaning and Import of “Reasonably Accessible.”*** A key challenge will be providing the Committee with practical examples of why it is necessary to manage differently information that is “not reasonably accessible” under current practice. Testimony on this point might emphasize the meaning of “reasonably accessible” by reference to Principle number 8 of the Sedona Production Principles (*see* <http://www.thesedonaconference.com>). That Principle states that the “primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval” and that “[r]esort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving and processing the data from such sources.”

Given the Committee’s conclusion that proposed Rule 26(f) is intended to mandate an early discussion of preservation of information, any requesting party that fails to obtain an agreed order or fails to seek a preservation order should be deemed to waive any objection when, in good faith, the producing party does not preserve information that is “not reasonably accessible.” Existing language in the Note describing the effect of the two-tier structure might be amended to clarify this principle.

***Cost Shifting.*** As proposed, Rule 26(b)(2) yields to the discretion of the District Court to decide whether or not to shift any costs of retrieving and producing information that are “not reasonably accessible.” The Committee rejected an approach adopted in Texas where mandatory cost-shifting has reportedly been successful in reducing unreasonable demands for production of electronic information. The Committee seeks examples of the treatment of excessive costs in current federal practice to help them assess whether they should change their stance on cost-shifting. It can be argued that allocation of costs is the most effective deterrent against overbroad, marginally relevant discovery and is not a bar to litigants obtaining all the information they need. Thus, if a sufficient case is made, the Rules Committee might be persuaded to impose a presumption of cost shifting for the excessive costs related to the preservation and production of electronic information that is “not reasonably accessible.”

***Burden to Identify “Not Reasonably Accessible” Information.*** The ambiguity regarding the scope of the obligation to identify the information not produced is addressed in part by the Note at p.13, but is still likely to create confusion about the scope and extent of the obligation and stimulate contentious motion practice.

One solution is to eliminate the identification obligation by revising the sentence as follows: “A party need not provide discovery of electronically stored information that is not reasonably accessible except on a showing of good cause.” The creation of an obligation to identify all information that is inaccessible is unnecessary and could be extremely burdensome depending on the specificity required in

identifying the inaccessible information. The suggested revision can be supported by an argument that the rule should not impose a new obligation, but should maintain the more traditional method of the responding party stating objections.

In the event that the “obligation to identify” is considered essential to ensure the fair and efficient functioning of the two-tier discovery structure and the protection of the “safe harbor” proposed for adoption as an amendment to Rule 37, the Committee Note should, at the very least, clarify the scope of the obligation to “identify” in order to ensure that a generalized description of broad categories of information, such as “disaster recovery back up tapes,” will suffice as opposed to creation of a specific log.

## **EARLY DISCUSSION OF PRESERVATION AND OTHER CONTENTIOUS ISSUES**

***Discussion of “Preserving Discoverable Information.”*** The proposals would also require that parties “discuss” issues relating to “preserving discoverable information” at the outset of litigation. The Committee believes that this approach will reduce abusive “sanction practice” by promoting early resolution of issues before information is lost. The Note to proposed Rule 26(f) at 19 suggests that parties could voluntarily agree to “specific provisions” which balance the need to “preserve relevant evidence with the need to continue routine activities critical to ongoing business [because] [w]holesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted.”

Testimony from litigants and practitioners highlighting the extent of abusive sanction practice and the impact of early discussions would be very helpful to the Committee on this issue. While an early discussion to resolve the scope of the common law preservation obligation as it applies to particular business systems would be particularly useful with regard to the proposed “safe harbor” under Rule 37(f), the Notes should at least emphasize the care that should be taken in crafting and issuing any preservation orders that may result.

***Discussion of “Disclosure or Discovery of Electronically Stored Information.”*** Some would revise the proposed amendment to Rule 26(f) at 8, ll. 64-65, as follows: “to discuss any issues relating to [disclosure or discovery of electronically stored] information.” The use of the broader, more inclusive phrase, as in proposed Rule 26(f)(3), would avoid undue focus on the proposed first time reference to a preservation obligation that some would argue comes close to the line of circumscribing the rulemaking power. According to this view, the Rules should deal with disclosure and discovery, not preservation of information, which is an issue of substantive law. However, early discussion of preservation issues could be a reasonable tradeoff for meaningful “two-tier discovery” and “safe harbor” amendments.

***Discussion of “Form of Production” and “Privileged Information.”*** The Committee has also mandated that early discussion include the “form” of production and the treatment of inadvertently produced privileged information. Both can be important in controlling costs and reducing unnecessary confusion. The default production standard would be “a form in which it is ordinarily maintained, or in an electronically searchable form.” Proposed Rule 34(b)(ii) at 27. While some argue that the proposed default standard is acceptable, others argue that a better standard would require production in a “reasonably usable form,” the existing standard in Rule 34. “Reasonably usable” better reflects the requirement that the requesting party receive information in a format that is useful to the party, without mandating specific formats. Such an approach would also keep the decision on permitting “direct access” to confidential proprietary databases where it belongs — with the producing party.

Another pertinent question is whether or not a party which receives notice that privileged material has been produced should certify that the material has been sequestered or destroyed if it is not returned. Certification should be required due to the relative ease of circulating electronic information with adverse consequences to the assertion of privilege.

## **“SAFE HARBOR” FOR OMISSIONS DUE TO ROUTINE OPERATIONS**

An especially significant Committee proposal is meant to establish in Rule 37(f) an explicit “safe harbor” from sanctions when information is lost due to routine computer operations. Although there is a real need to avoid the repeated necessity of shutting down ongoing business systems, current case law on the topic is unclear.

The logic behind the “safe harbor” proposal is that the cost and interrupting of routine computer systems is not justified when there exist other means such as an effective “litigation hold” process for preserving the needed information. In appropriate cases, ample means are available to preserve necessary and relevant information, including early discussion of the need for such extreme measures and entry of preservation orders tailored to the specific case. Equally important, however, many would argue that the rules should not articulate a “duty to preserve” information as a condition to creating a safe harbor. The exact dimensions of how a party chooses to carry out its obligations are beyond the rule-making power, as the Committee correctly implies in its Proposed Note.

Presently, the proposed safe harbor would apply only if the “party [also] took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action.” That standard could be improved by amending it to reference explicitly the duty to “preserve reasonably accessible information.” The Committee Note should also explain that if a party has identified information as “not reasonably accessible” pursuant to Proposed Rule 26(b)(2), the party would have no reason to know that the information is “discoverable” unless the parties agree or a court rules that the information is subject to discovery.

The safe harbor protection could also be lost if the party “violated an order in the action requiring it to preserve electronically stored information.” Inappropriate actions by individuals (such as deletion of active information despite knowledge of a litigation hold) would still be subject to potential censure under the inherent power of the court despite the safe harbor.

The Committee has also published an alternative formulation which would deny the safe harbor only if the party “intentionally or recklessly” failed to preserve the information. *See* Proposed Rule 37(f) at 33-34, fn.\*\*. Such a standard would provide better protection against abusive sanctions because proof of culpability would be included. Unfortunately, in its current form the alternative would allow sanctions for the “intentional or reckless” destruction of information identified as “not reasonably accessible,” such as backup tapes, even if no agreement or court order prohibits the destruction of such information. Therefore, the alternative should be revised to read as follows: “A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party’s electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of the information.” Testimony on the merits of this approach will be an important aspect of the hearings.

## **CONCLUSION**

Testimony at the hearings and additional written comments supporting the concept of a safe harbor (and reinforcing the importance of the “two-tier” approach to preservation obligations) will materially influence the ultimate decision on whether these proposals are endorsed by the Committee. Adoption of these amendments in the forms suggested above would be a major step towards a more realistic approach to electronic discovery.