

## When Technology Outpaces Discovery Rules

### Can Rule-making Rescue Businesses from the Oppressive Burdens of E-Discovery?

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#### I. Biographical Information

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Randall R. Riggs is a senior partner in the Indianapolis, IN office of Locke Reynolds, LLP, and Chair of the firm's Product Liability Practice Group. Mr. Riggs devotes his practice to the defense of juvenile products and vehicle/equipment manufacturers and distributors headquartered in the United States and internationally.

Mr. Riggs graduated *cum laude*, with honors, from Indiana University, Bloomington, Indiana, in 1974, and subsequently attended and graduated from Indiana University School of Law-Bloomington in 1977. Mr. Riggs served on the Board of Editors of the *Indiana Law Journal*. Today, Mr. Riggs is President of the Indiana University-Bloomington School of Law Alumni Association.

Mr. Riggs is an active member of the Defense Bar on both the state and national levels. He is a Fellow of the American College of Trial Lawyers, and is listed in the *International Who's Who of Product Liability Defense Lawyers* and the *Outstanding Lawyers of America*. Mr. Riggs is a member of the International Association of Defense Counsel, the Defense Research Institute, and the Defense Trial Counsel of Indiana. In 2002, Mr. Riggs was named "Indiana Defense Lawyer of the Year" by the Defense Trial Counsel of Indiana. Mr. Riggs was also the 2003 recipient of the Defense Research Institute's Rich Krochock Award. Mr. Riggs served as Indiana's State Representative to the Defense Research Institute from 1993-1997, is currently Chair of DRI's Product Liability Committee, and a member of DRI's Law Institute. Mr. Riggs is also a member of

the International Association of Defense Counsel's Product Liability and Advocacy Practice & Procedure Committees, having served as Chair for the latter. Mr. Riggs is a member of the Indianapolis Bar Association, the Indiana State Bar Association, and a founding member of the Indianapolis Law Club. Mr. Riggs is admitted to practice in the Northern and Southern District Courts of Indiana, the Central District of Illinois, the United States Court of Appeals for the Seventh Circuit and the Supreme Court of the United States.

Mr. Riggs resides in Indianapolis with his wife, Ann, and their three children, Carolyn, Bill and Susan.

### **Andrew J. Mallon**

Andrew J. Mallon concentrates his practice in products liability and general litigation. Mr. Mallon received his B.A. with honors from The College of William and Mary, Williamsburg, Va., in 1998 and his J.D., *cum laude*, from Indiana University School of Law, Indianapolis, Ind., in 2001, where he was a member of the Indiana International and Comparative Law Review.

Mr. Mallon is a member of the American, Indiana State and Indianapolis Bar Associations, the Defense Trial Counsel of Indiana and the Defense Research Institute. He also co-authored "Defending an Expert Attack Under Rule 702," Michigan Defense Trial Counsel and "Your Duty to Produce Documents Prior to Deposition," International Association of Defense Counsel (IADC) Newsletter.

## **II. Introduction to a New World**

Today approximately 93% of all new information generated is in magnetic or optical form. (*In re Bristo Meyers-Squibb*, 205 F.R.D. 437, 440 n2 (D.N.J. 2002) (citing Kenneth Withers, *Electronic Discovery: The Challenges and Opportunities of Electronic Evidence*. Address at the National Workshop for Magistrate Judges (July 2001) (based on 1999 statistics) ([www.kenwithers.com](http://www.kenwithers.com))). Only 0.01% of new information originates in paper form. At the same time, the amount of new information produced each year could fill 500,000 libraries each the size of the United States Library of Congress — or— the equivalent of all words ever spoken by human beings. (<http://www.sims.berkeley.edu/research/projects/how-much-info-2003/>).

Electronic commerce, interactive web sites, digital video, word processing, e-mail, databases, as well as hard drives, servers, CDs, floppies, etc, have permanently changed international business, and legal services throughout the world must evolve.

The collection and exchange of relevant information are part of any legal model. In American litigation, this process is a supposedly cooperative interaction between opposing parties called "discovery." During the pretrial discovery phase of American litigation, parties request that opposing parties gather and release specific corporate data, documents, and even tangible objects.

European fact finding equivalents take the form of reporting mandates, audits, or regulatory agency inquiries. (This paper defers to materials presented by other panel members concerning analyses of European investigations and disclosure requirements; *see also, i.e.*, Kenneth J. Withers, *Computer-Based Disclosure and Discovery in Civil Litigation*, 16<sup>th</sup> BILETA Annual Conference, April 9-10, 2001 (www.kenwithers.com)).

Traditionally, businesses relied on conscientious filing to create and maintain a useable collection of important business information. Manila folders, file cabinets, shelving units, bankers boxes and warehouses were the component parts of this traditional data base. Businesses knew what documents to keep, where they were kept and how to find them. They also knew when to dispose of them. Electronic transmittal and storage of data has made these traditional procedures obsolete. An attempt to satisfy today's discovery demands by utilizing an outmoded storage and retrieval system can be excessively wasteful of both time and money.

Consider the following hypothetical discovery or audit request:

Provide all documents, correspondence, files, meeting minutes, with attachments and presentations, regarding wheel design for XX model automobiles from 1999-2003.

Next, consider the design circumstances. Nine engineers developed the subject model design from offices in three different countries. All design discussion occurred electronically via e-mail, attachments to emails, digital video conferencing, and cellular phones provided by the company. Each of the nine engineers may have further consulted with other engineers from inside the company or elsewhere by similar means. Consequently, the vast majority of requested information and materials originated and would largely still exist in electronic form.

Further consider the computer systems and hardware involved: nine to fifteen hard drives (work P.C.s and laptops), nine cell phones, 200 company servers world wide, at least three digital video cameras, floppy disks, and back-up tapes recycled every 60 days. Hopefully, all the computer software is at least compatible throughout the various offices, but this may not be the case.

To gauge the volume of information involved, consider the following equivalencies in the "paper world":

<b>Type of storage medium</b>	<b>Approximate number of pages before filtering</b> (assuming media is full to capacity with a mixture of file and email data)
3.5" Diskette (1.44 Megabytes)	108 – 144
CD-Rom (625 Megabytes)	46,875 – 62,500

Hard Drive (15 Gig)	1,250,000 – 1,500,000
Network Hard Drive (36 Gig)	2,700,000 – 3,600,000
Backup Tape (40 Gig)	3,000,000 – 4,000,000

(Table provided by Kroll/Ontrack advertisement.)

Modern computer technology allows cheap and almost instantaneous communication and automated data storage. In fact, computer usage today is so pervasive that it not only facilitates communication but it actually encourages “stream of consciousness” exchanges. Good for “chat rooms”? Maybe. Good for business? Not really. The volume of data created and the burden to search and produce it make the traditional “paper” model unwieldy — if not impossible — for electronic based information.

While the current state of American e-discovery is only directly relevant to American companies and foreign companies subject to American litigation, the burden of retrieving and exchanging electronically stored data is universal. (see Proposed Directive 2001/34/EC as one example of the European Union’s preference and trend towards transparency of corporate information). This paper presents a brief overview of the current sad state of affairs on the e-discovery front and looks at some ongoing efforts to fix it.

### **III. Electronic Discovery Difficulties**

#### **A. Electronically Stored Data and Documents Conform Poorly to Current Discovery Rules**

U.S. Federal courts control litigation discovery through the Federal Rules of Civil Procedure, specifically Rules 26-37 and 45. (This paper, similar to many state courts, uses the Federal Rules as the benchmark for discovery procedure.) The Federal Rules were designed in a paper-based world and arguably fail to fully address the unique attributes of electronically stored data and correspondence. (See, The Sedona Conference, Preface to *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production*, iii (2004) ([www.thesedonaconference.com](http://www.thesedonaconference.com)) (“Sedona Principles”), attached as Appendix A. See also generally, Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 Def. Couns. J. 206 (2001).)

##### **1. Uniqueness of electronically stored data and documents**

Electronically stored data and documents are far different from paper records. (See, generally, Hon. Shira A. Scheindlin and Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to The Task?* 41 B.C.L. Rev. 327, 361-367 (Mar. 2000) (general technical analysis and unique attributes of electronically stored data and documents).) Unlike paper letters and memoranda, electronic documents, particularly e-mails, facilitate instant communication

between several people at once and, thus, are uniquely conversational. A message or document file may further exist in different places at the same time. Each recipient has the ability to respond and forward the same e-mail or document file to many recipients. Each forward or response adds new information and essentially becomes a new document. Quick conversational messages, forwards, responses, and attachments exponentially multiply the number of discoverable electronic document files.

Databases — and to a lesser extent draft document files — also pose unique spoliation issues (i.e., destruction of discoverable data). Unlike paper files, databases are essentially “snapshots” of data contained in a computer program at any given time. Databases have no finite paper-based existence. Rather, the single file changes each time information is added, subtracted, or otherwise manipulated. Each report or printout is necessarily different and incomplete depending on the search query or field parameters selected.

Electronic document files are more than words on a page. Word processing document files also change with each draft and possibly every instance the document file is opened. Word processing programs record these changing events, as well as who did the changes, when, how long it took, the document file size before the change, and file size after the change. Specific changes or revisions, the dates and times of the changes, and even the content of the revisions may be relevant and discoverable.

The technological complexity and volume of information subject to electronic discovery has a direct correlation to the expense of legal e-discovery. Broad, ambiguous discovery requests complicate the process. Additional computer users and hardware to be searched require broader, more complicated search efforts to insure reliability. The absence of electronic document retention policies and the passage of time tends to increase the complexity of any search. Restoration of deleted materials, or the need to search and produce materials from outdated programs, further complicates such projects.

Limitless cheap data storage is the benefit of electronic information storage, but it is also likely the greatest discovery cost inflator. Limitless storage means everything is saved. Post-it notes, margin notes, off-hand comments, sarcasm and humor that otherwise would have been appropriately discarded or spoken and forgotten as a “water cooler” comment are now recorded in e-mails and transmitted throughout a company and even the world. Most electronic discovery projects involve automated searches that catch every document file and eliminate the risk of overlooking misfiled or lost, but relevant, paper documents. Even the most conscientious and conservative automated search query yields volumes of irrelevant and duplicate documents. Increased volume equates to increased billable time to cull through results for non-privileged, responsive data. Increased volume also increases the risk of inadvertent disclosure of privileged, confidential, or personally embarrassing documents. And, increased volume

increases the need for discovery consultants and requires the creation and maintenance of document management systems.

## **2. Uniqueness poses discovery problems.**

Federal Rule of Civil Procedure 34 includes as “documents” the following: “writings, drawings, graphs, charts, photographs, phone records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form.” In addition, opposing parties explicitly request and may additionally define the term “documents” in their requests to include various forms of electronic media. While Rule 34 contemplates discovery of electronically stored data, it fails to address substantial dilemmas arising in the electronic discovery process. (*See generally*, Allman, *supra*. (Thorough analysis of unique problems caused by the differences between paper and electronic document discovery under Federal Rules.)) Such dilemmas may include the following:

- What is the company’s duty to preserve or restore deleted electronic documents and data and for how long does that duty continue?
- Should the company stop recycling emergency restoration back-up systems?
- What computer systems are to be searched and by whom — the company, the company’s lawyers, an outside vendor, the opposing party, the regulatory agency, a court?
- Are the company’s computers, servers and back-up recovery systems to be seized or otherwise diverted from their everyday functions to conduct these searches? If so, for how long?
- If the searches uncover confidential, privileged or embarrassing correspondence or information, can the company keep it confidential?
- Once the searches are finished, in what form should the data be transmitted: paper or electronic?
- What information about the resulting electronic documents should the company include— creation date, author, edit dates, etc.?
- Does the company need to restore and include hidden secondary data, drafts of electronic documents, or hidden database fields?

- Who pays the restoration, search, and production costs?

## **B. The Potential for Prejudice**

Some companies and defense attorneys argue that the requesting parties tailor requests to increase search complexity, volume, and costs to disproportionately and unreasonably burden corporate and governmental litigants. *Id.* at 208. Electronic discovery disproportionately burdens corporations and businesses whose use of technology is far greater and more pervasive than that of just one individual or family. Increased costs can be used as leverage in settlement negotiations regardless of the case's merits. Uninformed courts may not recognize the unique problems and costs posed by electronic discovery of corporations and large businesses, thus resulting in unreasonable expectations and sanctions.

Many large businesses have expertise, experience, sophistication and resources to accommodate new forms of discoverable information – albeit with increased costs. But small firms and corporations are particularly prejudiced. Small corporations may lack sophisticated and experienced in-house Information Technology (“IT”) departments. In-house IT departments are also needed to assist daily operations. “Down time” spent responding to electronic discovery disproportionately decreases productivity in small firms. Small firms and corporations lack resources and economies of scale to outsource discovery to the emerging cottage-industry of e-discovery consulting firms. Further, small firms are more likely to have outdated software and more likely lack formal document retention policies.

## **IV. Initial Efforts to Tame Electronic Discovery**

Courts and litigators began experiencing the above problems throughout the 1990's. While there was a growing concern, little was done to address the problems. (Myles Lynk and Rick Marcus, Discovery Subcommittee Report on Electronic Discovery Re: Proposal for Effort to Draft Possible Rule Changes to Address the Problems of Electronic Discovery, 1-2 (Apr. 14, 2003).) Mainly, businesses and courts were just getting used to the new media. *Id.*; *see also generally*, Scheindlin and Rabkin, *supra*, at 327 et seq. Courts and litigators could not predict where the technological explosion of the 1990's would leave the business landscape or when the dust would settle. Lynk and Marcus, *supra*, at 2. It was unclear if these discovery problems were so distinctive as to require deviations or amendments to correct discovery rules. *Id.* Again, as the problems were so new, there were no models on which to base new rules. *Id.* at 2-3.

Concern grew through the end of the 1990's, and the Discovery Subcommittee (the committee of lawyers, scholars, and judges associated with the U.S. Federal Judicial Council that is charged with evaluating possible changes to the Federal

Rules of Civil Procedure concerning discovery) began efforts to fully understand the nature and extent of the problems and possible solutions. *Id.*

The Subcommittee on Discovery is a subcommittee of the Advisory Committee on Civil Rules. The Advisory Committee on Civil Rules reports to The Committee on Rules of Practice and Procedure (a.k.a. “The Standing Committee”). The Standing Committee is the entity charged with developing and promulgating Federal rules of procedure. The Standing Committee submits rule changes to the U.S. Judicial Conference. If approved by the Conference, the amendments are transmitted promptly to the United States Supreme Court. The Supreme Court has the authority to prescribe the federal rules, subject to a statutory waiting period. 28 U.S.C. §§ 2072, 2075.

In January 2000, members of the Subcommittee attended an American Bar Association (“ABA”) Litigation Section meeting which included an electronic discovery session. Lynk and Marcus, *supra*, at 2-3. In March and October 2000, the Discovery Subcommittee held conferences in San Francisco and Brooklyn, respectively, on this subject. *Id.* at 3. With no consensus about the need for rule changes, the Subcommittee set aside the electronic discovery rule-making issue and decided to monitor developments. *Id.*

Local and model court rules began to develop to meet electronic discover problems. *See i.e.*, Tex. R. Civ. P. 196.4.; U.S. Dist. Ct. N.J. Local Rule 26.1; U.S. Dist. Ct. Ark. L.R. 26.1; U.S. Dist. Ct. Wyo. L.R. 26.1; Miss. R. Civ. Proc. 26(a)(5).

Case law directly addressing electronic discovery began to appear and continues to develop. So far, cases have handled ripe disputes, but few have provided applicable guidance outside the context of the specific facts at issue. (*See*, Preface to SEDONA PRINCIPLES, *supra*, at iii; *See also*, Scheindlin and Rabkin, *supra* note 6, at 378 (“*Case Law Will Not Produce Consistent Procedural Rules Regarding Electronic Discovery*”). Available case law has addressed the following general issues: (1) data preservation obligations; (2) early disclosure of nature and location of electronically stored data; (3) production management, burdens and costs; (4) privilege waiver; and (5) sanctions. (*See, generally*, Appendix B. *See, also*, KEN WITHERS, *Annotated Case Law and Further Reading on Electronic Discovery*, January 15, 2004. (<http://www.kenwithers.com/articles/index.html>))

In the absence of comprehensive black-letter law, electronic discovery has become a “hot-button” issue in American legal discourse. Scholastic literature, CLE courses, and conferences focusing on electronic discovery have exploded in number. As case by case more practitioners and courts have confronted electronic discovery issues, litigants, scholars and legal advocacy groups have attempted to provide comprehensive electronic discovery guidelines.

In 1999, the ABA Litigation Section released Discovery Standards addressing electronic discovery. In November of 2003, the ABA revised these standards to provide even stronger, more sophisticated, guidelines for conducting electronic discovery. See ABA CIVIL DISCOVERY STANDARDS: NOVEMBER 2003 DRAFT AMENDMENTS TO ELECTRONIC DISCOVERY STANDARDS, attached as Appendix C.

In October 2002, the Sedona Conference (a “think tank” of scholars, practitioners and judges) convening in Sedona, Arizona published *The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Discovery Production*. The Revised Sedona Principles were published January 2004 (hereinafter “The Principles”. See Appendix A, *supra*. The Sedona conference has emerged as one of the premier evaluations of electronic discovery. The Principles attempt objectivity and to infuse the conduct of electronic discovery with fairness and efficiency. The Principles identify common problems and provide a framework by which to analyze the unique circumstances of each case. Recognition of the uniqueness of electronic discovery, early planning, disclosure, and cooperation by both the requesting and the producing parties are hallmarks of the Sedona Principles. See generally, Appendix A.

## **V. New Federal Rules for Electronically Stored Data Discovery**

### **A. Preliminary Comment on New Electronic Discovery Rules**

In the summer of 2002, the Discovery Subcommittee invited comment on the need for rule changes to address concerns over electronic discovery procedures. Lynk and Marcus, *supra*, at 8. The Subcommittee sent letters to 250 lawyers who were identified as having an interest in possible rule changes. *Id.* The Subcommittee only received 12 responses, mostly by attorney organizations, such as LCJ and DRI. *Id.* The interests communicated through these limited responses broke down along “party” lines — plaintiff v. defendant, (i.e., ATLA et al. v. DRI, et al.). *Id.* at 9.

In 2003, the ABA Litigation Section leadership meeting addressed electronic discovery issues, and a handful of specific issues became clear. *Id.* These issues became the starting point for the Subcommittee’s rulemaking proposals. *Id.* at 9-10.

In April of 2003, the Discovery Subcommittee resolved to focus on seven areas and devise proposed rule language. *Id.* at 10-11. The Subcommittee made no firm commitment to change the federal rules. *Id.* at 22-23. Rather, the Subcommittee intended a good faith, objective attempt to draft workable language addressing the following seven proposed solutions: *Id.* at 11-22.

1. Inclusion of electronic discovery plan in 26(f) discovery plan.
2. Expansion of 26(a) disclosures to include party’s electronic storage systems.

3. Revise “data compilations” definition language in Rule 34 to include modern forms of data.
4. Establish default rule in the form of production for electronic documents.
5. Define producing party’s burden to retrieve and produce data it does not access regularly.
6. Address heightened risk of inadvertent disclosure and privilege waiver.
7. Include “Safe Harbor” provision to address electronically stored data preservation.

**B. “First Cut” Proposed Rule Changes**

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This section provides a brief summary of the rule language and issues addressed by the Discovery Subcommittee in their Fall 2003 meeting. See Appendix D for the complete rule proposals and the Discovery Subcommittee’s full commentary and analysis. Prof. Rick Marcus, DISCOVERY SUBCOMMITTEE REPORT MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES, RE: E-DISCOVERY RULE DISCUSSION PROPOSALS (“RULE PROPOSALS”), (September 15, 2003). The proposed changes are based and restyled format as per pending restyling process for FRCP 26-37 and 45. See Appendix D.

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The Discovery Subcommittee presented language for proposed rule changes in their fall 2003 meeting. The proposed rule changes address the principal areas mentioned above, as well as some other areas.

**1. Definition of the subject.  
(RULE PROPOSALS, at 4-5)**

A definition of the general subject was not part of the Subcommittee’s original proposals, but it emerged as an important issue during the drafting process. This issue became important because different attempts to describe the subject and materials or data at issue varied greatly, and were clumsy and limited. The new proposed Rule 26(h) settled on the catch phrase “electronically stored data.” Rule 26(h)(1) defines the data, materials, information and “documents” caught by this phrase. The Subcommittee’s comments suggest that even this definition may prove outdated as chemical and biological means to compute and store data may emerge. Nonetheless, even for new chemical or biological technology, the format and means to access such data will likely still depend on electronic technology.

**2. E-discovery issues addressed in early discovery plan. (RULE PROPOSALS, at 6-10)**

The proposed changes would require the parties to state their views and proposals on the following issues in the initial discovery plan under Rule 26(f):

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; and

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Whether provision should be made to facilitate discovery by protecting the right to assert privilege after the inadvertent disclosure or production of a privileged document. (RULE PROPOSALS at 7-8.)

Such changes would require the parties to discuss, negotiate and hopefully cooperate regarding their expectations for electronic discovery on a case by case basis. Where cooperation is not possible, early judicial intervention would set expectations for the parties going forward.

These proposed changes also address the increased risk of inadvertent disclosure of privileged material, which becomes more likely with increased volumes of data produced (*See also, infra*, part 6). Addressing the risk of inadvertent disclosure early, again, establishes the parties' expectations before the problem arises. As with most of the Subcommittee's proposals, both early electronic discovery planning and early discussion of inadvertent disclosure are hallmark issues and principles of the Sedona Conference and the ABA draft amendments to Discovery Standards.

The Subcommittee also proposed corresponding changes to FRCP 16 to require pre-discovery discussion and resolution of electronic discovery and related inadvertent disclosure issues in the pre-trial order. The Subcommittee also proposed changes to the Form 35 report of the planning meeting to reflect the changes addressed in Rule 26(h).

**3. Inclusive definition of "document" in Rule 34. (RULE PROPOSALS, at 11-13)**

The Subcommittee proposed a refined explanation of "documents" subject to discovery under FRCP 34. Instead of merely indicating "data compilations" as is currently stated, the new Rule 34 would include "... and *other data* or data compilations *in any magnetic or other media* from which information can be obtained ...." (RULE PROPOSALS at 11.)

The Subcommittee also addressed discovery of electronically stored data concerning the electronic document itself — thus, a "second tier" of data. (*Id.* at n. 5; *See, also, id.* at 12. ("second tier" data is often referred to in technical terms

as meta data and/or embedded data).) However, the Subcommittee did not reach a consensus on the initial production of this second tier of stored information concerning a particular discoverable electronic document. Some argue that the electronic document is incomplete and useless without the second tier of information. Others, perhaps more correctly, argue that such second tier information is rarely relevant or even used once produced and presents even greater burdens to retrieve and produce. Opponents of producing this second tier data would require a showing of good cause before production.

The Subcommittee's proposed Note also addresses the second tier of information and assures that it is generally discoverable. The Note, however, would not require initial production of such information. The Note also draws a distinction between accessible data (either first or second tier) and data that has been deleted and is available only on emergency back-up tapes or through forensic restoration using residual data or file fragments. The Note states that the latter data — that is not ordinarily accessible — is discoverable only pursuant to court order.

#### **4. Form of production. (RULE PROPOSALS, at 14-18)**

Proposed revisions and additions to Rule 34(b) address the form in which the producing party should produce responsive documents. The proposed changes allow, or alternatively require, the requesting party to designate the form of production in the request itself. To balance, the proposed changes also allow the producing party to object to the form requested based on undue burden and expense or irrelevance. As a default rule, under the proposed changes a producing party may produce data in the form in which it is ordinarily created and stored. Additionally, a producing party would only be required to produce data in one form, unless otherwise ordered.

As an explicit application of traditional paper-based discovery concepts, the newly proposed Rule 33(e) would provide that the producing party may produce electronically stored data or documents in lieu of a written interrogatory answer.

#### **5. The producing party's burden regarding inaccessible data. (RULE PROPOSALS, at 19-23)**

Under the new proposed Rule 26(h)(2), the responding party need not initially produce electronically stored data that is not readily accessible (i.e. undue burden required to restore such data). In either version of proposed language, the rule assumes that such data is “for disaster-recovery purposes” only or has no utility or accessibility in “the usual course of the responding party's business activities.” To balance this limitation, the proposed rule permits a court to order production of “inaccessible data” upon a showing of good cause. The court may also, however, require the requesting party to bear some or all of the costs for extraordinary retrieval and production efforts. Ambiguity exists between the two apparent standards that bear on the cost shifting analysis: “extraordinary efforts” and

“usual course of business” will likely be hotly debated and play out in a court’s decision whether to shift costs.

**6. Addressing privilege waiver.  
(RULE PROPOSALS, at 24-30)**

Although an issue worthy of discussion outside the electronic discovery context, the Subcommittee also addressed inadvertent disclosure of privileged electronic documents. The issue of privilege waiver in electronic discovery is distinctive, because there exists such uncertainty over the forms in which electronically data can and should be produced. The question becomes how do I review and cull out privileged documents to protect their confidentiality and privileged status when the data is stored permanently in an electronic medium (i.e. hard drive, CD, or back-up tape)? Also, the sheer amount of data to review provides a greater risk of inadvertent disclosure of privileged documents following a privilege review. For example, suppose a party requests production of the hard drive of one of our nine wheel engineers discussed above, but that engineer has consulted with the company’s attorneys and his hard drive contains privileged emails from the attorneys. Producing the engineer’s hard drive would arguably destroy the confidentiality of those emails and would thus waive the privileges attached to the emails.

The Subcommittee has proposed two approaches to this issue. First, under a “quick peek” approach from new Rule 34(b)(2)(E), an initial examination of a privileged document or file by the requesting party presumptively would not waive a privilege attached to a produced document. After the initial examination of the requested materials (i.e. the hard drive), including privileged and non-privileged information, the requesting party would request copies of desired files. If a requested document is arguably privileged, the parties can address privilege arguments to the court without the requesting party’s “quick peek” constituting a waiver of the privilege. For example, the requesting party’s inspection the engineer’s entire hard drive, including the privileged emails, would not waive the privileges attached to emails on the hard drive, and the emails could not be used by the requesting party. However, an obvious concern under this approach is that despite the fact that privileged documents could retain their privileged status, the requesting party’s ability to read the privileged materials during his “quick peek” would still be damaging.

Second, under the Subcommittee’s inadvertent production approach, the new Rule 34(b)(2)(E) would state affirmatively that an inadvertent production of a privileged document would not waive the privilege, if wavier would be unfair under the circumstances. This approach assumes that the responding party has had the opportunity and ability to review and remove privileged electronically stored information from the requested materials and can produce the requested materials without including the privileged information. For instance using our engineer’s hard drive example, the company may be able to copy the non-privileged parts of the engineer’s hard drive (i.e. everything but the

privileged emails) to another hard drive or disk and produce the copy in lieu of the original.

Under this approach, a document or file that is inadvertently produced after the responding party's privilege review may still remain privileged, if the circumstances indicate that a waiver of the privilege would be unfair. Factors indicating that a privilege should be maintained in a specific case include: (1) high volume of data production; (2) substantial efforts to avoid disclosure; (3) brief time between production and notification of the inadvertent disclosure; (4) small extent of the disclosure; (5) extent of prejudice to either party; and (6) other matters of fairness.

**7. Preservation, "safe harbor," and sanctions.  
(RULE PROPOSALS, at 30-35)**

The Subcommittee also addressed the responding party's duty to preserve electronically stored data. The Subcommittee proposed a new rule 34.1, "Duty to Preserve":

Upon commencement of an action, all parties must preserve documents and tangible things that may be required to be produced pursuant to Rule 26(a)(1) and (b)(1), except that materials described by Rule 26(h)(2) [inaccessible electronically stored data, see supra point 5] need not be preserved unless so ordered by the court for good cause. Nothing in these rules requires a party to suspend or alter the operation in good faith of disaster recovery or other computer systems for electronically-stored data unless the court so orders for good cause, providing that the party preserves a single day's full set of such backup data. (RULE PROPOSALS, at 31.)

As an alternative to new Rule 34.1 and similar to other electronic discovery rule proposals, the Subcommittee also discussed similar language for inclusion under Rule 26(h).

These proposals have been nicknamed "Safe Harbor" provisions, because they provide default rules — compliance with which would supposedly avoid sanctions for spoliation. (See also, Thomas Y. Allman, *The Case for a Preservation Safe Harbor in Requests for E-Discovery*, 70 Def. Couns. J. 417 (Oct. 2003).) Such provisions limit what requesting parties and courts may reasonably expect from responding parties, especially for inaccessible back-up storage data. First, no pre-litigation duty to preserve back-up data would attach, unless litigation reasonably could be expected to follow from a given event (i.e., after a trans-national blackout an energy company involved could reasonably anticipate future litigation concerning information and correspondence proximate to the blackout). Also, the Safe Harbor provision would require culpable conduct in failing to preserve electronically stored data before sanctions could attach. These provisions assure corporations that their reasonable, ordinary procedures

suffice to protect them from the cost and burden of perpetual data storage and possible sanctions stemming from a failure to preserve such data.

An additional proposal would limit sanctions for spoliation or failing to preserve electronically stored data. New Rule 26(f) "Failure to Produce Electronically Stored Data" would require intentional deletion specifically requested materials or willful or reckless deletions generally before the court could award sanctions. *Id.* at 34-35.

## **VI. Future of E-Discovery Rules Changes**

The fate of the proposed rule changes remains uncertain. Neither the Discovery Subcommittee nor the Advisory Committee on Civil Rules has committed to change any Federal rule to address electronic discovery issues. Case law analyzing and relying on the current rules to address electronic discovery is developing. Further, similar to Restatements of substantive law and horn books, secondary sources such as the Sedona Principles and the ABA Discovery Standards may provide sufficient guidelines for electronic discovery procedures without formal rule changes.

The Civil Rules Committee held a conference at Fordham Law School on February 20-21, 2004 to discuss the "first-cut" attempt at new rule language proposed by the Discovery Subcommittee. (RULE PROPOSALS, at 2.) Judges, attorneys, scholars, and other advocates convened there to debate the issues raised by the proposed rule changes as well as the ultimate need for such changes. The Civil Rules Committee could publish for public comment proposed amendments regarding e-discovery as soon as their Spring 2004 meeting currently scheduled for April 15 and 16, 2004.

As of the date of this paper, the results of the Fordham convention and Spring Civil Rules Committee meeting were unknown. *See* Supplement.

## **VII. Conclusion**

While the fate of electronic discovery rulemaking remains uncertain, problems and questions will persist until bench and bar fully appreciate electronic discovery issues and can settle on reasonable expectations for electronic discovery procedures. Parties should share the tremendous burdens and costs of sharing electronically stored data. Rulemaking seems like the obvious means to reach a consensus. However, new rules also risk creating new problems in an already confusing area of law. Still, concern over electronic discovery is building as requesting parties become more familiar with technology. The wealth of discoverable electronically stored information is constantly expanding. Even if the rules change, the question remains whether courts will continue to abide parties using the burden of electronic discovery to gain unfair advantage over corporate litigants that have neither the time nor the resources to simultaneously run their business while responding to onerous e-discovery.

The Federal Rules will continue to favor liberal disclosure of information in litigation, and European authorities will likewise generally favor transparency in regulatory reporting. Courts and other authorities, however, must wholly appreciate that disclosure and transparency of electronically stored information come at tremendous, and sometimes intentionally prejudicial, costs to businesses. With luck, the proposed rulemaking efforts will help to establish such an appreciation as a universal norm for evaluating the collection and exchange of electronically stored information.

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