

The New E-Discovery Rules

Second Edition

**Amendments to the
Federal Rules of Civil Procedure**

(Effective Dec. 1, 2006 & 2007)

New Federal Evidence Rule 502

(Effective Sept. 19, 2008)

**Excerpts from the Judicial Conference Committee Reports
Full text of the Current E-Discovery Rules**

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Preface

In May 2005, the Advisory Committee on the Federal Rules of Civil Procedure submitted to the Standing Committee on the Rules of Practice and Procedure a comprehensive package of proposed amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information. The proposed amendments would affect Rules 16(b), 26(a), 26(b)(2), 26(b)(5), 26(f), 33, 34(a), 34(b), 37(f) and 45, as well as Form 35. The Advisory Committee package included a historical analysis, a statement of each proposed rule change in “black line” format, as well as explanatory “Committee Notes.”

In September 2005, the Standing Committee, after approving the proposed amendments, submitted the amendments along with a written report to the Judicial Conference of the United States. The Judicial Conference approved the amendments and transmitted them to the United States Supreme Court.

On April 12, 2006, the United States Supreme Court approved the entire package of proposed amendments without comment. The amendments took effect on December 1, 2006.

On December 1, 2007, comprehensive “Restyle” amendments took effect which completely rewrote the text of rules 1 through 86 of the Federal Rules of Civil Procedure and the Official Forms. “Style/Substantive Amendments” also took effect which affected Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78.

On September 19, 2008, S. 2450 (Public Law 110-322) was signed into law adding new Rule 502 to the Federal Rules of Evidence. The legislation protects against the inadvertent waiver of the attorney-client privilege or the work product protection in connection with e-discovery disclosures.

This publication includes those portions of the September 2005 Standing Committee report and the May 2005 Advisory Committee package which pertain to the e-discovery amendments. It also includes the full text of Rules 16, 26, 33, 34, 37 and 45, plus related Official Forms and committee notes, as amended by the December 1, 2007 “Restyle” and “Style/Substantive” Amendments. Finally, the publication includes the full text of new Evidence Rule 502 and the related committee note.

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Standing Committee Report

SEPTEMBER 2005 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:*

The Committee on Rules of Practice and Procedure met on June 15-16, 2005. All members of the Committee attended as well as the Committee's reporter, Professor Daniel R. Coquillette. The Deputy Attorney General, James B. Comey, attended the meeting with John S. Davis, Associate Deputy Attorney General, and Elizabeth Shapiro, Assistant Director, Federal Programs Branch, Civil Division, Department of Justice. Professor Geoffrey C. Hazard and Joseph F. Spaniol, consultants to the Committee, and John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office also attended.

All of the chairs and reporters of the advisory rules committees were present, with the exception of the reporter to the Appellate Rules Committee, as follows: Judge Samuel A. Alito, chair of the Advisory Committee on Appellate Rules; Judge Thomas S. Zilly, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Lee H. Rosenthal, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Susan C. Bucklew, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules. Also in attendance were Professor Sara Sun Beale, consultant to the Criminal Rules Committee, James N. Ishida and Jeffrey N. Barr, attorney advisors in the Administrative Office, and Tim Reagan of the Federal Judicial Center.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 16, 26, 33, 34, 37, 45, 50, Supplemental Rules A, C, and E, and a new Supplemental Rule G (with conforming amendments to Rules 9(h), 14, 26(a), and 65.1), and revisions to Form 35 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2004. Three public hearings were held at

*Publisher's note: The September 2005 report of the Committee on Rules of Practice and Procedure also addressed proposed amendments to non-discovery related federal rules of civil procedure as well as to other sets of court rules. The portion of the report set forth herein pertains only to those proposed amendments to the federal rules of civil procedure which address discovery of electronically stored information.

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which 74 witnesses testified; many of these witnesses also submitted written comments. An additional 180 written comments were submitted.

Discovery of Electronically Stored Information

The proposed amendments to Rules 16, 26, 33, 34, 37, 45, and revisions to Form 35 are aimed at discovery of electronically stored information. The advisory committee first heard about problems with computer-based discovery at a discovery conference in 1996. In 1999, the then-chair laid out the advisory committee's daunting mission to devise "mechanisms for providing full disclosure in a context 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 to the litigation." The advisory committee began intensive work on this subject in 2000. Since then, bar organizations, attorneys, computer specialists, and members of the public have devoted much time and energy in helping the rules committees understand and address the serious problems arising from discovery of electronically stored information. The advisory committee's study included several mini-conferences and one major conference, bringing together lawyers, academics, judges, and litigants with a variety of experiences and viewpoints. The advisory committee also heard from experts in information technology who provide technical electronic discovery services to lawyers and litigants.

The discovery of electronically stored information raises markedly different issues from conventional discovery of paper records. Electronically stored information is characterized by exponentially greater volume than hard-copy documents. Commonly cited current examples of such volume include the capacity of large organizations' computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and to receive 250 to 300 million e-mail messages monthly. Computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores. Computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge. A third important difference is that electronically stored information, 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 rule amendments can helpfully address.

The advisory committee monitored the experiences of the bar and bench with these issues for several years. It found that the discovery of electronically stored information 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 law-

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yers in determining discovery rights and obligations in particular cases. Developing case law on discovery into electronically stored information under the current rules is not consistent and is necessarily limited by the specific facts involved. Disparate local rules have emerged to fill this gap between the existing discovery rules and practice, and more courts are considering local rules. Without national rules adequate to address the issues raised by electronic discovery, 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 even individual litigants.

The costs of complying with unclear and at times vague discovery obligations, which vary from district to district in ways unwarranted by local variations in practice, are becoming increasingly problematic. Unless timely action is taken to make the federal discovery rules better able to accommodate the distinctive features of electronic discovery, those rules will become increasingly removed from practice, and similarly situated litigants will continue to be treated differently depending on the federal forum.

Electronic Discovery in Historical Perspective

Before the civil rules became effective in 1938, discovery in both law and equity cases in the federal courts was extremely limited. The 1938 civil rules provided for liberal discovery, further expanded by amendments in 1946 and 1970. Since then, 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. Each of these proposed sets of discovery amendments was vigorously opposed both by those who perceived any narrowing of discovery as inimical to the basic premise of American litigation, and by those who protested that the rules committees had not gone far enough to control discovery and the attendant costs and delays. The present proposals have prompted similar reactions.

The present electronic discovery proposals grew out of the advisory 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 to make the rules apply better to electronic discovery problems share the same focus.

The historical perspective shows that any proposal to add or strengthen rule provisions for discovery containment produces significant debate. Such debate is not in itself a sign that the proposals are fundamentally flawed. It is right to be concerned if the proposals are supported only by a narrow segment of the bench or bar. But it is not surprising to find that proposals to increase judicial involvement in

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discovery or to encourage the application of the existing proportionality factors — which require a court to limit discovery if the costs and burdens outweigh its likely benefits — would be opposed more by one side of the bar than the other.

In general, there is a high level of support for rules changes to recognize and accommodate electronic discovery. The American Bar Association Section on Litigation, the Federal Bar Council, and the New York State Bar Association Commercial and Federal Litigation Section, all submitted comments generally supporting the proposed electronic discovery amendments and made helpful criticisms during the public comment period. The Department of Justice, which both brings and defends civil actions, also favors the proposals. To achieve yet a larger consensus, specific aspects of the published proposal that had been criticized during the public comment period were revised.

The advisory committee unanimously approved the amendments proposed to Rules 16, 26(a), 26(b)(5), 26(f), 33, 34, and Form 35. All but two members of the advisory committee voted in favor of recommending approval of the amendments to Rule 37(f) and Rule 26(b)(2), including the parallel provisions in the proposed amendment to Rule 45. The Committee supported all but two of the proposed amendments unanimously. The only exceptions were the proposed amendments to Rule 26(b)(5) and the parallel provisions in the proposed amendment to Rule 45, as to which four members withheld their support, and the proposed amendment to Rule 37(f), as to which one member abstained. The Committee Note has been revised to address certain of the concerns raised about Rule 26(b)(5).

Proposed Amendments to Rules 16, 26(a), 26(f), 33, 34, 45, and Form 35

The proposed amendments to Rule 16, Rule 26(a) and (f), 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.

The amendment to Rule 16 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 16 is amended to invite the court to address the disclosure or discovery of electronically stored information 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 protection as trial-preparation material 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." The amendment makes the rule

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consistent with disclosure practices in the courts and with the proposed electronic discovery amendment. It was not published for public comment and is recommended as a conforming amendment.

Under the proposed amendment to Rule 26(f), the parties' conference is to include discussion of any issues relating to disclosure or discovery of electronically stored information. The topics to be discussed include the form of producing electronically stored information, a distinctive and recurring problem in electronic discovery resulting from the fact that, unlike paper, electronically stored information may exist and be produced in a number of different forms. The parties are to discuss preservation, which has new importance in this context because of the dynamic character of electronic information. The parties are also directed to discuss whether they can agree on approaches to asserting claims of privilege or work-product protection after inadvertent production in discovery.

The problems that can result from efforts to guard against privilege waiver often become more acute when discovery of electronically stored information is sought. The volume of the information and the forms in which it is stored may make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming, yet less likely to detect all privileged information. Inadvertent production is increasingly likely to occur. Because the failure to screen out even one privileged item may result in an argument that there has been a waiver as to all other privileged materials related to the same subject matter, early attention to this problem is more important as electronic discovery becomes more common. Under the proposed amendments to Rules 26(f) and 16, if the parties are able to reach an agreement to adopt protocols for asserting privilege and work-product protection claims that will facilitate discovery that is faster and at lower cost, they may ask the court to include such arrangements in a case-management or other order.

The proposed amendments to Rules 33 and 34 clarify how these discovery workhorses are to apply to electronically stored information. The proposed amendment to Rule 33 clarifies that a party may answer an interrogatory involving review of business records by providing access to the information if the interrogating party can find the answer as readily as the responding party can.

Under the proposed amendment to Rule 34, electronically stored information is explicitly recognized as a category subject to discovery that is distinct from "documents" and "things." The term "documents" should not continue to be stretched to accommodate all the differences between paper and electronically stored information. Distinguishing in the rules between documents and electronically stored information makes it clear that there are differences between them important to managing discovery. Rule 34 is also amended to authorize a requesting party to specify the form of production, such as in paper or electronic form, and for the responding party to object. The rule provides an electronic discovery analogue

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to the existing language that prevents massive “dumps” of disorganized documents by requiring production of documents as they are ordinarily maintained or labeled to correspond with the categories in the request. Under the proposed amended rule, absent a court order, party agreement, or a request for a specific form for production, a party may produce responsive electronically stored information in the form in which the party ordinarily maintains it or in a reasonably usable form. Absent a court order, the party need only produce the same electronically stored information in one form.

The proposed amendment to Rule 45 conforms the provisions for subpoenas to changes in other discovery rules related to discovery of electronically stored information.

Form 35 is amended to add the parties’ proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties’ report to the court.

The Committee concurred with the advisory committee’s recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 16, 26(a), 26(f), 33, 34, 45, and Form 35 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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). As noted in describing Rules 16 and 26(f), the volume of electronically stored information 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. The inadvertent production of privileged or protected material is a substantial risk. The proposed amendment to Rule 26(b)(5) clarifies the procedure to apply when a responding party asserts a claim of privilege or of work-product protection after production.

Under the proposed amendment, if a party has produced information in discovery that it claims is privileged or protected as trial-preparation material, it may notify the receiving party of the claim, stating the basis for it. 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

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information is privileged or protected as claimed and, if so, whether a waiver has occurred. A producing party is not free to give belated notice of privilege or protection at any point in the litigation; courts will continue to examine whether a privilege or work-product protection claim was made at a reasonable time when delay is part of the substantive law on waiver.

Because the proposed amendment only establishes a procedure for asserting privilege or work-product protection claims after production and does not attempt to change the rules that determine whether production waives the privilege or protection asserted, it does not trigger the special statutory process for adopting rules that modify privilege. By providing a clear procedure to allow the responding party to assert privilege after production, the amendment helpfully addresses the parties' burden of privilege review, which is particularly acute in electronic discovery.

The proposed amendment to Rule 26(b)(5) did not attract controversy or much comment during the public comment period. However, it was the occasion of considerable debate at the Committee meeting. The four members who voted against the amendment to Rule 26(b)(5) expressed the view that the new procedure could be used to disrupt litigation, particularly if the claim of privilege or work-product was made late in the case. The majority of the Committee did not share the concern that parties would deliberately delay a claim of privilege or work product because to do so might waive the protection under the applicable substantive law. Moreover, bad faith litigation tactics are subject to sanctions and control by the court.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 26(b)(5) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendment to Rule 26(b)(2)

The proposed amendment to Rule 26(b)(2) clarifies the obligations of a responding party to provide discovery of electronically stored information that is not reasonably accessible, an increasingly disputed aspect of such discovery. Under the amendment, a party need not produce electronically stored information that is not reasonably accessible because of undue burden or cost. While the features that may make it burdensome or costly to access electronically stored information vary from system to system and with the progress of electronic storage systems over time, examples under current technology include deleted information, information kept on some backup-tape systems for disaster recovery purposes, and legacy data remaining from systems no longer in use.

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The amendment requires the responding party to identify the sources of potentially responsive information that it has not searched or produced because of the costs and burdens of accessing the information. This is an improvement over the present practice, in which responding parties simply do not produce electronically stored information that is difficult to access. Under the amended rule, if the requesting party moves for the 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 and may impose appropriate terms and conditions. The proposed amendment codifies the best practices of parties and courts with experience in these issues.

The proposed amendment to Rule 26(b)(2) responds to distinctive problems encountered in discovery of electronically stored information that have no close analogue in the more familiar discovery of paper documents. Although computer storage often facilitates discovery, some forms of computer storage make it very difficult to access, search for, and retrieve information. The difficulties may arise for a number of different reasons primarily related to the technology of information storage, reasons that are likely to change over time. The information contained on easily accessed sources — whether computer-based, paper, or human — may be all that is reasonably useful or necessary for the litigation, particularly given the voluminous amounts of information characteristically available on computers. Lawyers sophisticated in these problems are developing a two-tier practice in which they first obtain and examine the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources.

The relationship between the proposed rule and preservation is specifically addressed in the Committee Note, which states that the rule does not undermine or reduce common-law or statutory preservation obligations. A party is reminded that it may be obliged to preserve information stored on sources it has identified as not reasonably accessible, but the amendment does not attempt to define, and does not change, the preservation obligations that arise from independent sources of law. The amended rule requires that the information identified as not reasonably accessible must be difficult to access by the producing party for all purposes. A party that makes information “inaccessible” because it is likely to be discoverable in litigation is subject to sanctions now and would still be subject to sanctions under the proposed amendment.

The Committee concurred with the advisory committee’s recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 26(b)(2) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

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Proposed Amendment to Rule 37(f)

The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems — the recycling, overwriting, and alteration of electronically stored information that attends normal use. This is a different problem from that presented by information kept in the static form that paper represents; such information is not destroyed without an affirmative, conscious effort. By contrast, computer systems lose, alter, or destroy information as part of routine operations, making the risk of losing information significantly greater than with paper. 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. At the same time, a litigant’s right to obtain evidence must be protected. There is considerable uncertainty as to whether a party must, at risk of severe sanctions, interrupt the operation of the electronic information systems it is using to avoid any loss of information because of the possibility that the information might be sought in discovery. The advisory committee has heard strong arguments in support of better guidance in the rules.

The proposed amendment provides limited protection against sanctions under the rules for a party’s failure to provide electronically stored information in discovery. The proposed amendment states that absent exceptional circumstances, sanctions may not be imposed under the civil rules if electronically stored information sought in discovery has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith. The proposed rule recognizes that all electronic information systems are designed to recycle, overwrite, and change information in routine operation, not because of any relationship between the content of particular information and litigation, but because they are necessary functions of regular business operations. 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 hard-copy information. Using an example from current technology, many large organizations routinely recycle hundreds of backup tapes every two or three weeks; placing a hold on the recycling of these tapes for even short periods can result in hundreds of thousands of dollars of expense. Similarly, the regular purging of e-mails or other electronic communications is necessary to prevent a build-up of data that can overwhelm the most robust electronic information systems.

Systems must also be able to filter other types of communications in order to continue operations. Sophisticated and often custom-designed databases may be functional only if they continually revise the information they manage. Such information destruction features are an integral part of computer system design and

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operation. The amended rule applies only to information lost due to the “routine operation of an electronic information system” — the ways in which such systems are generally designed and programmed to meet the party’s technical and business needs.

Sanctions are not avoided simply by showing that information was lost in the routine operation of an information system. It also must be shown that the operation was in good faith. The proposed amendment does not provide a shield for a party that intentionally destroys specific information because of its relationship to litigation, or for a party that allows such information to be destroyed in order to make it unavailable in discovery by exploiting the routine operation of an information system. Depending on the circumstances, good faith may require that a party intervene to modify or suspend certain features of the routine operation of a computer system to prevent the loss of information, if that information is subject to a preservation obligation. When such a preservation obligation arises depends on the substantive law of each jurisdiction, which is not affected by the proposed rule. If a party is under a duty to preserve information because of pending or reasonably anticipated litigation, such intervention in the routine operation of an informational system is one aspect of what is often called a “litigation hold.”

By stating that, absent exceptional circumstances, sanctions may not be imposed under the discovery rules for electronically stored information lost because of the routine good faith operation of a computer system, the proposed rule provides guidance in a troublesome area distinctive to electronic discovery.

The Committee concurred with the advisory committee’s recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 37(f) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

The proposed amendments to the Federal Rules of Civil Procedure are in Appendix C with an excerpt from the advisory committee report.

Advisory Committee Report

To: Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure

From: Honorable Lee H. Rosenthal, Chair, Advisory Committee on the Federal Rules of Civil Procedure

Date: May 27, 2005 (Revised July 25, 2005)

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee held three hearings in 2005 on proposed rules amendments published for comment in August 2004. The hearings were held on January 12 in San Francisco, January 28 in Dallas, and February 11 and 12 in Washington, D.C. The Committee met at the Administrative Office of the United States Courts on April 14-15, 2005. Draft minutes of the April 2005 meeting are attached. Summaries of the written comments and testimony presented at the hearings are also provided with the several recommendations of proposed rule amendments for adoption.

Parts I and II present action items. Part I recommends transmission for approval of amendments to several rules. Rules 5(e) and 50(b) come first. The next set of rule amendments is a comprehensive package addressing discovery of electronically stored information, including revisions of Rules 16, 26, 33, 34, 37, and 45, as well as Form 35. The last set of rule amendments recommended for approval is a new Supplemental Rule G governing civil forfeiture actions; this package includes conforming changes to other Supplemental Rules, including the title and Rules A, C, and E. Part I includes a conforming amendment to Rule 26(a)(1) that was published with Rule G and conforming amendments to Rules 9(h) and 14 and 26(a)(1)(E) that are recommended for adoption without publication. For each of the four categories of rule amendments recommended for approval, these materials set out a brief introductory discussion, followed by the text of the proposed rule amendment and Committee Note and a summary and explanation of the changes made since publication.

* * * * *

C. Rules 16, 26, 33, 34, 37, 45, and Form 35

1. Introduction

Over five years ago, the Advisory Committee began examining whether the discovery rules could better accommodate discovery directed at information generated by, stored in, retrieved from, and exchanged through, computers. The proposed amendments published for comment in August 2004 resulted from an extensive and intensive study of such discovery. That study included several mini-conferences and one major conference, bringing together lawyers, academics, judg-

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es, and litigants with a variety of experiences and viewpoints. The Committee also sought out experts in information technology and heard from those involved in the rapidly expanding field of providing electronic discovery services to lawyers and litigants.

Through this study, the Committee reached consensus on two points. First, electronically stored information has important differences from information recorded on paper. The most salient of these differences are that electronically stored information is retained in exponentially greater volume than hard-copy documents; electronically stored information is dynamic, rather than static; and electronically stored information may be incomprehensible when separated from the system that created it. Second, these differences are causing problems in discovery that rule amendments can helpfully address.

In August 2004, the Committee published five categories of proposed amendments: amending Rules 16 and 26(f) to provide early attention to electronic discovery issues; amending Rule 26(b)(2) to provide better management of discovery into electronically stored information that is not reasonably accessible; amending Rule 26(b)(5) to add a new provision setting out a procedure for assertions of privilege after production; amending Rules 33 and 34 to clarify their application to electronically stored information; and amending Rule 37 to add a new section to clarify the application of the sanctions rules in a narrow set of circumstances distinctive to the discovery of electronically stored information. In addition, Rule 45 was to be amended to adapt it to the changes made in Rules 26-37.

At the three public hearings held in 2005, 74 witnesses testified, many of whom also submitted written comments. An additional 180 written comments were submitted. The Committee revised the proposed rules amendments and note language in light of the public comments. The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rules 16, 26(b)(5)(B), 26(f), 33, 34, 45, and Form 35, as well as a conforming amendment to Rule 26(a). All but two members of the Committee voted in favor of recommending that the Standing Committee approve the proposed amendments to Rules 26(b)(2) and 37(f). The Committee unanimously recommends that the Standing Committee approve the corresponding changes to Rule 45 except for the change that tracks proposed Rule 26(b)(2), and all but two members of the Committee recommend that the Standing Committee approve this portion of proposed amendment Rule 45. This introduction sets out a brief background of the Committee's work and discusses each of the proposed amendments.

When the 2000 amendments were in their early stages of consideration, it was very helpful to step back and consider what brought the Committee to that point. In a 1997 conference held at Boston College Law School – a meeting very similar in purpose to the 2003 conference on electronic discovery held at

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the Fordham University School of Law – Professors Stephen Subrin and Richard Marcus presented papers on the historical background of the discovery rules. Some highlights of their papers usefully put the present issues into perspective and context.

Before the civil rules became law in 1938, discovery in both law and equity cases in the federal courts had been extremely limited. When the Committee deliberated on the liberal discovery rules that Professor Edson Sunderland drafted, they raised the concern that expanded discovery would force settlements for reasons and on terms that related more to the costs of discovery than to the merits of the case, a concern raised frequently in the context of electronic discovery.* But the debates did not focus on discovery. Instead, the focus was on issues of national uniformity and separation of powers.

In 1946 and 1970, amendments to the discovery rules continued to expand the discovery devices. The 1970 amendments were what Professor Marcus has called the high-water mark of “party-controlled discovery.”*** Those amendments included the elimination of the requirement for a motion to obtain document production and of the good cause standard for document production. Since the “high-water mark,” the discovery rules have been amended in 1980, 1983, 1993, and 2000, to provide more effective means for controlling the discovery devices. In 1980, the Committee made the first change designed to increase judicial supervision over discovery, adding a provision that allowed counsel to seek a discovery conference with the court. The Committee considered, and rejected, a proposal to narrow the scope of discovery from “relevant to the subject matter” to “relevant to the issues raised by the claims or defenses,” and to limit the number of interrogatories. The public comment that proposal generated was similar in tone and in approach to some of the comments on certain of the electronic discovery proposals published in August 2004. Many protested any narrowing of discovery as inimical to the basic premise of American litigation; others protested that the Committee had not gone far enough in restricting discovery and controlling the costs and delay it caused; yet others worried that the Committee would feel “pressure” to approve rules prematurely.*** In the face of the vigorous debate, the Committee withdrew these proposals and submitted what then-chair Judge Walter Mansfield characterized as “watered down” proposals. The scope change rejected in 1980 did become law, but not until 2000, and then in a modification that emphasized the supervisory responsibility of the court.

Despite an institutional bias against frequent rule changes, the lack of meaningful amendments in 1980 resulted in significant amendments three years later. The 1983 amendments marked a significant shift toward greater judicial in-

*Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 Boston Coll. L. Rev. 691, 730 (1998).

**Marcus, *Discovery Containment Redux*, 39 Boston Coll. L. Rev. 747, 749 (1998).

***Marcus, 39 Boston Coll. L. Rev. at 770.

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volvement in all pretrial preparation, most particularly in the discovery process. The amendments expanded Rule 16 case-management orders; deleted the final sentence of Rule 26(a), which had said that “[u]nless the court orders otherwise under subdivision (c) of this rule, the frequency and use of these methods is not limited”; and added the paragraph to Rule 26(b) directing the court to limit disproportionate discovery. The newly-appointed reporter to the Advisory Committee, Professor Arthur Miller, described these changes as a “180 degree shift in orientation.” Yet, as Professor Miller pointed out in his written submission to the Committee endorsing the proposed electronic discovery amendments, the 1983 amendments turned out not to be effective by themselves to calibrate the amount of discovery to the needs of particular cases.*

In 1993, continued unhappiness about discovery costs and related litigation delays led to a package of proposals that included mandatory broad initial disclosures (with a local rule opt-out feature added in response to vigorous criticism) and presumptive limits on the number of interrogatories and depositions. In part, these amendments were “designed to give teeth to the proportionality provisions added in 1983.”** In 2000, the initial disclosure obligations were cut back and made uniform, and Rule 26(b)(1) was changed to limit the scope of party-controlled discovery to matters “relevant to the claim or defense of any party,” allowing discovery into “the subject matter involved in the action” only on court order for good cause.

During the study that led to the 2000 amendments, the Advisory Committee became aware of problems relating to electronic discovery. The Committee was urged by lawyers, litigants, and a number of organized bar groups to examine these problems. In 1999, when the 2000 proposals were recommended for adoption following the public comment period, the Committee fully understood that its work was incomplete. In his 1999 report to the Standing Committee recommending adoption of the 2000 amendments, Judge Niemeyer observed that since the work on the proposals had begun in 1996, “the Committee . . . kept its focus on the long-range discovery issues that will confront it in the emerging information age. The Committee recognized that it will be faced with the task of devising mechanisms for providing full disclosure in a context 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 to the litigation. While the tasks of designing discovery rules for an information age are formidable and still face the Committee, the mechanisms adopted in the current proposals begin the establishment of a framework in which to work.” The present electronic discovery proposals grow out of the Committee’s work on the 2000 amendments and in many ways continue that work. As noted in the report to the Standing Committee in 1999, the Committee’s efforts leading to the 2000 amendments focused on the “architecture of discovery rules” to determine whether changes can be effected to reduce the

*Prof. Arthur Miller, 04-cv-221.

**Marcus, *Discovery Containment*, 39 Boston Coll. L. Rev. at 766.

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costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management. The proposed amendments to make the rules apply better to electronic discovery problems have the same focus.

The historical perspective is a reminder that any proposal to add or strengthen rule provisions for what Professor Marcus calls “discovery containment” produces significant debate. The vigor, volume, and themes of the public comment on the August 2004 electronic discovery proposals are not new to proposed discovery rule amendments. The debates over the amendments that became effective in 1983, 1993, and 2000 were vigorous, with many favoring liberal party-controlled discovery and many advocating more effective tools for discovery management and limits. Such debate is not in itself a sign that the proposals are fundamentally flawed. It is right to be concerned if the proposals are only supported by a narrow segment of the bench or bar. But it is not surprising to find that proposals to increase judicial involvement in discovery or to encourage the application of the existing proportionality factors would be opposed more by one side of the bar than the other.

Without understating the nature or depth of the concerns raised in response to specific proposals, discussed at length below, it is useful to note some points of agreement. There was a high level of support for changes to the federal rules to recognize and accommodate electronic discovery. Although there was certainly disagreement as to the proposed amendments to Rules 26(b)(2) and 37(f), there was also support from broad-based organizations that do not represent a reflexive plaintiff or defense view, such as the American Bar Association Section of Litigation,* the Federal Bar Council,** and the New York State Bar Association Commercial and Federal Litigation Section.*** Many of the comments criticized aspects of the published proposals that have now been revised. As noted, after the comment period, all but two members of the Advisory Committee approved these proposed amendments as revised in light of the comments. The proposals calling for early attention to electronic discovery and addressing problems in the form of producing electronically stored information received broad support from the bar and the unanimous approval of the Advisory Committee.

The historical review also provides a useful context for considering the question of timing. The Advisory Committee has a history of carefully considering rule amendments and, when appropriate, withdrawing proposed amendments after public comment. The class action proposals of 1996 are a good example. The history of discovery amendments in particular shows great caution. The most prominent example is the 1978 decision to defer the “scope” proposal because there

*04-cv-062.

**04-cv-191.

***04-cv-045.

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was vigorous opposition, as well as vigorous support. That decision to defer was criticized on the ground that it would significantly delay the proposal. A version of the scope limitation did become effective – twenty years later. It is always tempting to defer action because more time brings more information, particularly in an area of ongoing technological change. But deferring has costs. The calendar of the rules enabling process makes any delay a significant one. As long ago as the 1998-99 hearings on what became the discovery amendments of 2000, lawyers were urging the Committee to proceed with alacrity in rulemaking for e-discovery. The need for rulemaking now in this area is reflected in the local rules and state rules that have been enacted and the growing number of such rules that have been proposed. Many of these local rule efforts have been deferred because of the proposals to amend the national rules, but the perceived need for such rules means that they will not remain in check indefinitely. The 1993 amendments led in part to the 2000 amendments, teaching us much about the problems of local rulemaking in areas that the national discovery rules address, problems that we do not want to create in the area of electronic discovery. And the possibility of technological change will always exist; there is no reason to think that stability on that front will arrive any time soon.

The Committee has been studying electronic discovery for the last five years. We have learned a great deal, reflected in the rule proposals and the refinements made since publication. Those proposals and refinements are summarized below.

2. The Specific Proposals

i. Early Attention to Electronic Discovery Issues: Rules 16, 26(a), 26(f), and Form 35

Introduction

The comments consistently applauded the directives in Rule 16(b) and Rule 26(f) for the parties to discuss electronically stored information in cases that involve such discovery and to include these topics in the report to the court, and for the court to include these topics in its scheduling orders. The overall directive is broad, but specific provisions focus on three areas recognized as frequent sources of difficulty in electronic discovery: the form of producing electronically stored information in discovery; preserving information for the litigation; and the assertion of privilege and work-product protection claims.

The proposed amendments that direct early attention to electronic discovery issues, as published, did not include a revision to Rule 26(a)(1), although the amendments to Rule 26(f) referred to disclosures as well as discovery of electronically stored information. The Committee approved a proposed conforming amendment to Rule 26(a), making the Rule 26(a)(1) description of information subject to disclosure requirements consistent with the addition of electronically stored

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information to the discovery rules. Present Rule 26(a)(1) is redundant in requiring disclosure of both certain “documents” and “data compilations,” because the present version of Rule 34 makes “data compilation” a subset of “documents.” Present Rule 26(a)(1) is potentially inconsistent with the proposed revision of Rule 34, which adds “electronically stored information” as a category separate from “documents.” Amending Rule 26(a)(1) to make it apply to “documents and electronically stored information,” and deleting the words “data compilations,” cures this inconsistency. Because Rule 34(a) is revised to distinguish between “documents” and “electronically stored information,” revising Rule 26(a)(1) to conform to this distinction removes the argument that there is a duty to provide in discovery, but not to disclose, electronically stored information.

One concern initially raised about adding electronically stored information to Rule 26(a)(1) was that it could require parties to locate and review such information too early in the case. Such information, often voluminous and dispersed, can be burdensome to locate and review, and early in the case the parties may not be able to identify with precision the information that will be called for in discovery. The Committee concluded that this concern was not an argument against this conforming amendment. The disclosure obligation has been read as applying to electronically stored information and will continue to apply. The obligation does not force a premature search, but only requires disclosure, either initially or by way of supplementation, of information that the disclosing party has decided it may use to support its case.

The Committee decided against revising Rule 26(a)(3) to include “electronically stored information.” Rule 26(a)(3) applies “in addition to the disclosures required by Rule 26(a)(1)” and is directed to identifying exhibits for trial. Electronically stored information is included in “each document or other exhibit” that the current rule requires to be identified in pretrial disclosures.

Proposed amended Rule 26(f) states that the parties are to discuss “any issues relating to preserving discoverable information.” Some comments urged that this directive should be downgraded to the Note, in part out of concern that calling for discussion of the question will promote early applications for preservation orders. Most comments supported the inclusion of preservation as a topic to be discussed early in the case. The dynamic nature of electronically stored information, and the fact that routine operation of computer systems changes and deletes information, make it important to address preservation issues early in cases involving discovery of such information. The Committee decided not to change the published rule language, which includes not only electronically stored information but all forms of information. In response to the concerns raised in the comment period about preservation orders, the Note has been revised to state that preservation orders entered over objections should be narrowly tailored and that preservation orders should rarely be issued on ex parte applications.

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Proposed new Rule 26(f)(3) directs parties to discuss “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.” Form 35 is amended to provide that in the report to the court of their proposed discovery plan, the parties include their proposals for disclosure or discovery of electronically stored information. Rule 16(b)(5) provides that the scheduling order the court enters may include “provisions for disclosure or discovery of electronically stored information.” The comments emphasized the importance of discussing these topics early in the case, to identify disputes before costly and time-consuming searches and production occur. Only one change is proposed to this part of the published proposals. Many comments noted that more than one form of production might be appropriate in a case, because a party may store different information in different forms. Accordingly, this proposed amendment is revised to state that the parties should discuss “any issues relating to . . . electronically stored information, including the form or forms in which it should be produced.” Consistent changes are made in other proposed amendments addressing the form of production as well.

Proposed new Rule 26(f)(4) adds issues relating to the assertion of privilege and work-product protection to the list of topics to be addressed in the parties’ initial conference. For years, the Committee has wrestled with how to address the problem of privilege waivers within the rules. The Committee began this work in response to concerns over the expense and delay attendant to reviewing hard-copy documents for privilege and generating a privilege log. During the study of electronic discovery, the Committee learned that reviewing electronically stored information for privilege and work product protection adds to the expense and delay, and risk of waiver, because of the added volume, the dynamic nature of the information, and the complexities of locating potentially privileged information. Metadata and embedded data are examples of such complexities; they may contain privileged communications, yet are not visible when the information is displayed on a computer monitor in ordinary use or printed on paper. Parties can ameliorate some of the costs and delays created by the steps necessary to avoid waiving privilege or work-product protection during discovery through agreements that allow the assertion of privilege or work product protection after documents or electronically stored information are produced. Including this topic among those to be discussed encourages early attention to the problem and facilitates efforts to reach such agreements. Form 35 is amended to provide that if the parties have agreed to an order regarding claims of privilege or protection as trial-preparation material asserted after production, they are to include a description of the proposed order provisions in their report to the court. Rule 16(b)(6) is amended to state that if the parties have reached an agreement for “asserting claims of privilege or protection as trial-preparation material after production,” the court may include those agreements in the scheduling order.

The proposed rule as published described the topic that the parties should discuss as whether, if the parties agreed, the court should enter an order

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protecting the right to assert privilege after production. During the comment period, some expressed uneasiness about the language that the court enter an order “protecting” against waiver of privilege because it is not clear that this protection is effective against third parties. The Committee has revised the proposed rule and note language to meet these concerns, without changing the substance of what this aspect of the parties’ discovery planning conference is to include.

Many comments urged the Committee to include work-product protection as well as privilege within this rule, as well as proposed Rule 26(b)(5)(B). Although the consequences of waiver are less acute for work product protection than for attorney-client privilege, many documents and electronically stored information involve both and issues of waiver frequently involve both. The Committee decided to amend the published proposed rule to include both privilege and work-product protection, using the label for such protection that appears elsewhere in the discovery rules, “trial-preparation materials.”

The Proposed Rules and Committee Notes

The Advisory Committee recommends approval for adoption of amended Rules 16(b), 26(a), 26(f), and Form 35.

Rule 16(b)

The Committee recommends approval of the following amendment:

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;

~~(5)~~(7) the date or dates for conferences before trial, a final pretrial conference, and trial; and

~~(6)~~(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

Rule 16(b)

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.

Changes Made After Publication and Comment

This recommendation is of a modified version of the proposal as published. Subdivision (b)(6) was modified to eliminate the references to "adopting" agreements for "protection against waiving" privilege. It was feared that these words might seem to promise greater protection than can be assured. In keeping with changes to Rule 26(b)(5)(B), subdivision (b)(6) was expanded to include agreements for asserting claims of protection as trial-preparation materials. The Committee Note was revised to reflect the changes in the rule text.

The proposed changes from the published rule are set out below.

Rule 16. Pretrial Conferences; Scheduling; Management*

* * * * *

(b) Scheduling and Planning.

* * * * *

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

The scheduling order may also include

* * * * *

(6) ~~adoption of the parties' any agreements the parties reach for protection against waiving asserting claims of privilege or of protection as trial-preparation material after production;~~

* * * * *

Rule 26(a)

The Committee recommends approval of the following amendment:

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, ~~data compilations~~, 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;

* * * * *

Committee Note

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a)

Rule 26(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.

Changes Made After Publication and Comment

As noted in the introduction, this provision was not included in the published rule. It is included as a conforming amendment, to make Rule 26(a)(1) consistent with the changes that were included in the published proposals.

Rule 26(f)

The Committee recommends approval of the following amendments to Rule 26(f).

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(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 state-

ment 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;

~~(3)~~(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

~~(4)~~(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 (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

Restyled Rule 37

- (e) Failure to Provide 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.
- (f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Oct. 21, 1980, eff. Oct. 1, 1981; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

COMMITTEE NOTE

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 45. Subpoena

(a) In General.*

(1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must:

- (i) state the court from which it issued;
- (ii) state the title of the action, the court in which it is pending, and its civil-action number;
- (iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and
- (iv) set out the text of Rule 45(c) and (d).

(B) *Command to Attend a Deposition—Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

*Publisher's note: Portions of the rule that relate to the subject of the December 1, 2006 e-discovery amendments are underlined for the convenience of the reader.

Restyled Rule 45

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issued from Which Court.*** A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, 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) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:

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

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(b) **Service.***

(1) *By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the

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inspection of premises before trial, then before it is served, a notice must be served on each party.

- (2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:
 - (A) within the district of the issuing court;
 - (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
 - (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or
 - (D) that the court authorizes on motion and for good cause, if a federal statute so provides.
 - (3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.
 - (4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.
- (c) **Protecting a Person Subject to a Subpoena.***
- (1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.
 - (2) ***Command to Produce Materials or Permit Inspection.***
 - (A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
 - (B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing

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or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

- (i)** fails to allow a reasonable time to comply;
- (ii)** requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;
- (iii)** requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv)** subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

- (i)** disclosing a trade secret or other confidential research, development, or commercial information;
- (ii)** disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or
- (iii)** a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a

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subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.*

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information: *

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

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding 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 for a protective order, the person responding 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.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or

Publisher's note: Portions of the rule that relate to the subject of the December 1, 2006 e-discovery amendments are underlined for the convenience of the reader.

Restyled Rule 45

tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

- (B) *Information Produced.* If information produced in response to a subpoena 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; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.
- (e) **Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to discovery of “books” in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Former Rule 45(b)(1) required “prior notice” to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given “prior” to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

Restyled Forms

Form 50.* Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

(Caption—See Form 1.)

The plaintiff *name* requests that the defendant *name* respond within ____ days to the following requests:

1. To produce and permit the plaintiff to inspect and copy and to test or sample the following documents, including electronically stored information:**

(Describe each document and the electronically stored information, either individually or by category.)

(State the time, place, and manner of the inspection and any related acts.)

2. To produce and permit the plaintiff to inspect and copy—and to test or sample—the following tangible things:

(Describe each thing, either individually or by category.)

(State the time, place, and manner of the inspection and any related acts.)

3. To permit the plaintiff to enter onto the following land to inspect, photograph, test, or sample the property or an object or operation on the property.

(Describe the property and each object or operation.)

(State the time and manner of the inspection and any related acts.)

(Date and sign—See Form 2.)

Form 52. Report of the Parties' Planning Meeting.

(Caption—See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring*:

(e.g., name representing the plaintiff.)

2. Initial Disclosures. The parties [have completed] [will complete by *date*] the initial disclosures required by Rule 26(a)(1).

*All forms were revised and renumbered as part of the Dec. 2007 "Restyle" amendments.

**Publisher's note: Portions of the rule that relate to the subject of the December 1, 2006 e-discovery amendments are underlined for the convenience of the reader.

Restyled Forms

3. Discovery Plan. The parties propose this discovery plan:

(Use separate paragraphs or subparagraphs if the parties disagree.)

- (a) Discovery will be needed on these subjects: *(describe.)*
- (b) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)
- (c) (Maximum number of interrogatories by each party to another party, along with the dates the answers are due.)
- (d) (Maximum number of requests for admission, along with the dates responses are due.)
- (e) (Maximum number of depositions by each party.)
- (f) (Limits on the length of depositions, in hours.)
- (g) (Dates for exchanging reports of expert witnesses.)
- (h) (Dates for supplementations under Rule 26(e).)

4. Other Items:

- (a) (A date if the parties ask to meet with the court before a scheduling order.)
- (b) (Requested dates for pretrial conferences.)
- (c) (Final dates for the plaintiff to amend pleadings or to join parties.)
- (d) (Final dates for the defendant to amend pleadings or to join parties.)
- (e) (Final dates to file dispositive motions.)
- (f) (State the prospects for settlement.)
- (g) (Identify any alternative dispute resolution procedure that may enhance settlement prospects.)
- (h) (Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.)
- (i) (Final dates to file objections under Rule 26(a)(3).)
- (j) (Suggested trial date and estimate of trial length.)
- (k) (Other matters.)

(Date and sign—see Form 2.)

New Evidence Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

- (a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver**—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
 - (1) the waiver is intentional;
 - (2) the disclosed and undisclosed communications or information concern the same subject matter; and
 - (3) they ought in fairness to be considered together.
- (b) **Inadvertent Disclosure**—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
 - (1) the disclosure is inadvertent;
 - (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
 - (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).
- (c) **Disclosure Made in a State Proceeding**—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:
 - (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
 - (2) is not a waiver under the law of the State where the disclosure occurred.
- (d) **Controlling Effect of a Court Order**—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.
- (e) **Controlling Effect of a Party Agreement**—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

New Evidence Rule 502

- (f) **Controlling Effect of This Rule**—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.
- (g) **Definitions**—In this rule:
- (1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
 - (2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

(Enacted Sept. 19, 2008, Pub. Law 110-322, 122 Stat. 3537. The rule applies in all proceedings commenced after the date of enactment and, insofar as is just and practicable, in all proceedings pending on such date of enactment.)

Explanatory Note on Evidence Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules (Revised 11/28/2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. See, e.g., *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass “millions of documents” and to insist upon “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”).

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court’s order will be enforceable. Moreover, if a federal court’s confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

New Evidence Rule 502

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. See, e.g., *Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, e.g., *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. See generally *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in