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Request to Testify
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December 13, 2004

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Via ~~US Mail~~ Federal Express

Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, D.C. 20544

Re: Request to testify at Civil Rules Hearing in San Francisco

Dear Mr. McCabe:

I respectfully request the opportunity to testify at the January 12, 2005 Civil Rules Hearing in San Francisco, California. My testimony would generally reflect the isssues and analysis set forth in my Article that will be published in the next few weeks in the Tennessee Law Review, entitled "Is E-Discovery So Different That It Requires New Discovery Rules? An Analysis of Proposed Amendments to The Federal Rules of Civil Procedure."[1]

I previously sent a draft of this piece to John Rabiej in March 2004, for circulation to the members of the Discovery Subcommittee at Professor Richard Marcus's suggestion.

You may reach me at hnoyes@pillsburywinthrop.com or (415) 983-6438.

Thank you for attention to this request.

Sincerely,

Henry S. Noyes

Enclosure

Cc: Professor Richard Marcus

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[1] The Tennessee Law Review retains the copyright to this Article.

1.

IS E-DISCOVERY SO DIFFERENT THAT IT REQUIRES NEW DISCOVERY RULES? AN ANALYSIS OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

HENRY S. NOYES*

The U.S. Judicial Conference Advisory Committee on Civil Rules has recommended a package of proposed amendments to the Federal Rules of Civil Procedure to address issues raised by discovery of electronic information. The recommendations are premised on the theory that discovery of electronic information is truly different from discovery of non-electronic information and that the differences require a special set of discovery rules. This Article tests the bases for this theory and concludes that there are five true differences between discovery of electronic information and discovery of traditional hard copy information, but two of the differences are addressed by the Rules in their current form. The following three true differences might justify amendment of the Rules: (a) discovery of electronic information may include "legacy" data—a party's electronic data that cannot be translated by that party because it no longer possesses the technology to translate the information; (b) certain electronic information is dynamic—by its nature it changes and evolves without any human intervention; and (c) discovery of electronic information entails a choice of what form the production should take—electronic information in its native, electronic format or electronic information reduced to or translated into hard copy form.

This Article concludes that the package of amendments proposed by the Advisory Committee is inadequate. It fails to adequately address two of the three identified true differences between discovery of electronic information and discovery of non-electronic information. The package also includes several amendments that are unnecessary, unwise, and not based on any factor unique to discovery of electronic information. For example, the Committee proposes to amend the definition of documents in Rule 34 to encompass "electronically stored information." Yet Rule 34 currently refers to "data compilations from which information can be obtained," a phrase which has been interpreted to include electronic, magnetic, chemical, biological and any other information storage process. The proposed language is both

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unnecessary and more limiting than the present language. This Article proposes several alternative amendments that address the true differences between discovery of electronic information and discovery of hard copy information by adding language that is consistent with the framework and purpose of the existing rules.

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I. INTRODUCTION

The U.S. Judicial Conference Advisory Committee on Civil Rules (the "Advisory Committee") has recommended for publication and comment a package of proposed amendments to the Federal Rules of Civil Procedure (the "Federal Rules") to address issues raised by discovery of electronic information.[1] This Article considers whether discovery of electronic information is sufficiently different from discovery of non-electronic information that it requires a different set of discovery rules. To the extent it is different, this Article then considers whether the amendments that the

1. Memorandum from Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to the Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 20, *available at* http://www.uscourts.gov/rules/comment 2005/CVAug04.pdf (Aug. 3, 2004) [hereinafter Advisory Committee Recommendations]. The Advisory Committee's recommendations and accompanying proposed amendments were formally released in August 2004. *Id.* at 1; COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 1, *available at* http://www.uscourts.gov/rules/comment2005/CVAug04.pdf (Aug. 3, 2004) [hereinafter PROPOSED AMENDMENTS]. The proposed amendments accompany a twenty-page memorandum of recommendations of the Advisory Committee and have separate pagination from the memorandum. The Advisory Committee on Civil Rules is charged with carrying on a "'continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use' in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary." *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, reprinted in* 195 F.R.D. 386, 386 (2000). The specific "package of proposals aimed at discovery of electronically stored information" was first set forth in a May 17, 2004 memorandum. Memorandum from the Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to the Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 1 (May 17, 2004) (on file with author) [hereinafter Advisory Committee Memo, May 2004].

Advisory Committee has proposed are necessary and prudent and whether there are better alternatives.

Section II of this Article provides some background on the investigation conducted by the Advisory Committee's Discovery Subcommittee[2] (the "Discovery Subcommittee") regarding discovery of electronic information. This investigation led to the Advisory Committee's recommendation to amend the Federal Rules. Section III considers whether electronic information is sufficiently different from hard copy information to warrant special treatment in the Federal Rules. Section IV discusses the extent to which the Federal Rules already address the differences between discovery of electronic information and discovery of hard copy information. Section V considers a series of general arguments—not tied to the specific language and amendments proposed by the Advisory Committee—that amendments to the Federal Rules are neither necessary nor prudent.

Section VI assesses the package of changes that the Advisory Committee has recommended. These changes, including my conclusions regarding them, can be broken down into six essential categories:

1. Requiring the parties to consider electronic discovery issues prior to the initial Rule 26(f) conference of the parties and requiring the court to address the subject in its initial scheduling order. I conclude that Rule 26(f) should be amended to mandate early consideration of electronic discovery issues.
2. Revising the definition of "documents" in light of the various types of electronic information that can be sought through discovery. I conclude that Rules 26 and 34 should not be amended to revise the definition of "documents."
3. Establishing that the producing party need not produce data that is "not reasonably accessible," absent good cause. I conclude that Rule 26 should be amended to provide that information that is "not reasonably accessible," and in fact not accessed, is presumptively not discoverable.
4. Requiring production of only one "form" of the requested electronic information. I conclude that Rule 34(b) should be amended to provide that a party need only produce a "data compilation" in the form, or forms, in which it is maintained.
5. Protecting against inadvertent privilege waiver when parties exchange electronic information. I conclude that the Federal Rules should not be amended to address the review and production of documents for privileged information.
6. Establishing a "safe harbor" from sanctions for spoliation of evidence where the producing party meets certain document retention

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2. The Discovery Subcommittee was first appointed in 1996. Memorandum from Myles V. Lynk and Richard L. Marcus, to Advisory Committee on Civil Rules 1 (Apr. 14, 2003) (on file with author) [hereinafter Discovery Subcommittee Report, Apr. 2003].

standards. I conclude that Rule 26(b) should be amended to set forth a party's duty to preserve evidence; however, I do not believe that Rule 37 should be amended to limit the sanctions available for failure to preserve electronic information.

II. THE ADVISORY COMMITTEE'S RECOMMENDATIONS TO AMEND THE FEDERAL RULES OF CIVIL PROCEDURE TO ADDRESS DISCOVERY OF ELECTRONIC INFORMATION

Beginning in 1997, the Discovery Subcommittee convened a series of meetings with practicing lawyers to solicit their opinions about what changes to the Federal Rules would be useful.[3]

> One topic arose repeatedly during the various interactions with the bar in 1997 that had not been raised before—problems with discovery of electronically-stored, or digital, information. Repeatedly, lawyers told the Committee that this was an area that urgently needed attention, and that the difficulties presented by this form of discovery could, in some cases, dwarf the problems with hard copy discovery on which the Committee had focused in light of previous episodes of rule amendment.[4]

The Discovery Subcommittee took a number of steps to investigate electronic discovery issues.[5] Its members considered the concerns raised by the American Bar Association's Litigation Section[6] and hosted "mini-conferences" in San Francisco in March 2000 and in Brooklyn in October 2000 on discovery of electronic information.[7] The Discovery Subcommittee also held a major conference on electronic discovery in February 2004 at Fordham Law School.[8] Working separately, the Federal Judicial Center began

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3. *Id.* at 1.

4. *Id.* at 1-2. According to the Advisory Committee, it has "long heard concerns that the discovery rules are inadequate to accommodate the unique features of information generated by, stored in, retrieved from, and exchanged through, computers." Advisory Committee Memo, May 2004, *supra* note 1, at 20. For lists of articles, cases, and other commentary on this topic, see Lisa M. Arent et al., *Ediscovery: Preserving, Requesting & Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131, 132 n.3 (2002) and Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 341 n.53 (2000).

5. *See* Advisory Committee Memo, May 2004, *supra* note 1, at 20.

6. *See* Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 2.

7. *Id.*

8. Memorandum from Myles V. Lynk and Richard L. Marcus, to the Advisory Committee on Civil Rules 4, *available at* http://www.kenwithers.com/ rulemaking/index.html (Apr. 5, 2004) [hereinafter Lynk & Marcus Memo, Apr. 2004]. "Judges and scholars, and lawyers representing widely differing views in the electronic discovery debate, were invited to discuss the multiple issues surrounding [the Discovery Subcommittee's] effort to address through the rule-making process concerns presented by electronic discovery in civil

tracking the plethora of Continuing Legal Education events and articles on the topic.[9] The Federal Judicial Center also undertook a two-year project on electronic discovery[10] that resulted in a sixty-three page report entitled *A Qualitative Study of Issues Raised by the Discovery of Computer-Based Information in Civil Litigation.*[11]

In September 2002, Professor Richard L. Marcus, Advisor and Special Consultant to the Advisory Committee and the Discovery Subcommittee, sent a letter and accompanying memoranda to about 250 "E-discovery Enthusiasts"[12] inviting "reactions that would be helpful to the Discovery Subcommittee . . . as it considers whether to develop proposals to amend the Federal Rules of Civil Procedure to address special features of discovery of electronic, or computer-based, information."[13]

In addition to its own investigation, the Discovery Subcommittee considered the work of the Sedona Conference Working Group on Electronic Document Production.[14] The Sedona Conference Working Group, "a group of attorneys and others experienced in electronic discovery matters," convened to address both "the production of electronic data and documents in discovery" and their concern over "whether rules and concepts developed largely for paper discovery would be adequate to handle issues of electronic discovery."[15]

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litigation." *Id.*

9. Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 4. The Federal Judicial Center noted nearly 250 such events between January 1, 2001 and April 2003. *Id.*

10. Letter from Richard L. Marcus, Special Consultant to the Discovery Subcommittee, to E-discovery Enthusiasts 2, *available at* http://www.kenwithers.com/ rulemaking/index.html (Sept. 2002) [hereinafter Letter to E-discovery Enthusiasts].

11. MOLLY TREADWAY JOHNSON ET AL., FED. JUD. CTR., A QUALITATIVE STUDY OF ISSUES RAISED BY THE DISCOVERY OF COMPUTER-BASED INFORMATION IN CIVIL LITIGATION, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ElecDi10.pdf/$file/ElecDi10.pdf (Sept. 13, 2002) [hereinafter FJC Study]. The FJC found that "it appears that computer-based discovery problems that are brought to the attention of a magistrate judge are spread widely across the federal docket, and are not limited to large-scale litigation between corporate parties." *Id.* at 6.

12. Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 5; Letter to E-discovery Enthusiasts, *supra* note 10, at 1. "E-discovery Enthusiasts" are defined as "lawyers identified as having a prior involvement in addressing these issues." Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 5.

13. Letter to E-discovery Enthusiasts, *supra* note 10, at 1.

14. Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 5. The initial draft of the Sedona Principles was disseminated in March of 2003. *Id. See* The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* i, *available at* http://www.thesedonaconference.org/ miscFiles/SedonaPrinciples200303 (Mar. 2003) [hereinafter *Sedona Principles* 2003].

15. The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* iii, *available at* http://www.the sedonaconference.org/miscFiles/SedonaPrinciples200401 (Jan. 2004) [hereinafter *Sedona Principles* 2004]. "The Sedona Conference Working Group on Electronic Document

The Sedona Conference Working Group drafted *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*,[16] in which it set forth a list of fourteen recommendations and principles.[17]

As a result of the Discovery Subcommittee's investigations and findings, it requested and received authorization from the Advisory Committee to "try to draft language on a variety of possible proposals for rule language."[18] In September 2003, the Discovery Subcommittee met "to determine which possible rule language to present to the full Committee" and "to attempt to specify and detail the possibilities for rulemaking of which the Subcommittee is presently aware."[19] The Discovery Subcommittee then presented proposed rule language to the Advisory Committee for discussion.[20] After these proposals and the general work and findings of the Discovery Subcommittee were discussed at the Fordham Conference, the Discovery Subcommittee submitted its final proposals to the Advisory Committee on April 5, 2004.[21] As a result, on May 17, 2004, the Advisory Committee recommended for

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Production was conceived to develop reasonable principles to guide organizational practices and legal doctrine." *Id.* The group considered the argument that "there is no need for electronic document production standards because the Federal Rules of Civil Procedure provide an adequate framework to address the issues that arise." *Sedona Principles* 2003, *supra* note 14, at 7. Rejecting the argument, the group noted how its members have

> first-hand experience of unreasonable and unfair burdens in producing electronic documents in litigation. These unfair burdens have included, among other things, spending millions of dollars to process and review large volumes of electronic documents that had little likelihood of being relevant to the case; and preserving at great cost thousands of backup tapes that were subsequently not sought by the opposing party later in discovery.

Id.

16. *Sedona Principles* 2004, *supra* note 15, at i.

17. *Id.*

18. E-mail from Richard L. Marcus, Special Consultant to the Discovery Subcommittee, to Henry Noyes (Sept. 8, 2003, 07:49) (on file with author); *see* Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 7.

19. Richard L. Marcus, Notes on Discovery Subcommittee Meeting 1 (Sept. 5, 2003) (on file with author) [hereinafter Notes on Discovery Subcommittee Meeting].

> Throughout, however, it was important to keep in mind that there was no commitment to recommend any change in the rules. Strong arguments have been made that the present rules are adequate to [do] the job, and the question whether specific amendments would work improvements was one that could only be addressed effectively at a later date.

Id.

20. Memorandum from Richard L. Marcus, to Advisory Committee on Civil Rules 1, *available at* http://www.kenwithers.com/rulemaking/index.html (Sept. 15, 2003) [hereinafter Marcus Advisory Committee Memo, Sept. 2003].

21. Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 1, 4. Professor Marcus described the proposals as "the result of a long and careful process in which the Subcommittee has considered various alternatives, different perspectives and many ideas." *Id.* at 4.

publication and comment its "package of proposals aimed at discovery of electronically stored information."[22]

III. IS ELECTRONIC INFORMATION SUFFICIENTLY DIFFERENT FROM OTHER EVIDENCE TO WARRANT SPECIAL TREATMENT IN THE FEDERAL RULES?

Rather than proposing general amendments to the rules of discovery, the Advisory Committee has elected to address a distinct subset of discovery issues relating to electronic information.[23] This Section considers whether discovery of electronic information is truly different from discovery of non-electronic information and, to the extent it is different, whether the differences require a different set of discovery rules.[24]

This Section concludes that there are five true differences between discovery of electronic information and discovery of traditional hard copy information: (1) discovery of electronic information frequently requires a party to hire outside experts or consultants to locate, retrieve, and translate that party's information; (2) electronic information may include "legacy" data, electronic data that cannot be translated because the responding party no longer possesses the technology to translate the information; (3) discovery of electronic information often requires the requesting party to conduct an on-site inspection of the responding party's computer system, which may contain privileged or proprietary information that cannot be segregated from the requested information on the computer system; (4) certain electronic information is dynamic, by its nature changing and evolving without any

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22. Advisory Committee Recommendations, *supra* note 1, at 1; Advisory Committee Memo, May 2004, *supra* note 1, at 1. *See* Fed. Rules of Practice and Procedure Admin. Office of the U.S. Courts, Federal Rulemaking - The Rulemaking Process: A Summary for the Bench and Bar, *at* http://www.uscourts.gov/rules/proceduresum.htm (Oct. 2004) (explaining the steps taken by the federal judiciary to amend the Rules).

23. *See* Advisory Committee Recommendations, *supra* note 1, at 1; Advisory Committee Memo, May 2004, *supra* note 1, at 1.

24. For more analysis on these issues, see Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 565-66 (2001); Kenneth J. Withers, *Is Digital Different? Electronic Disclosure and Discovery In Civil Litigation*, *at* http://www.kenwithers.com/articles/bileta/index.htm (Dec. 30, 1999).

Professor Redish observed:

> [O]ne could decide that electronic discovery does, in fact, give rise to a unique set of problems, yet nevertheless conclude that special treatment in the Federal Rules is unwarranted. One could reach this conclusion on the basis of the premise that, as a structural matter, the rules should provide relatively limited control over discretion to determine how best to control discovery in individual cases. Alternatively, one could conclude that the problems to which electronic discovery gives rise do not differ meaningfully from the problems traditional discovery causes and therefore do not deserve unique treatment, even if one rejects the notion that the rules should give judges broad discretion.

Redish, *supra*, at 565-66.

human intervention; and (5) electronic information may be produced either in its native, electronic format or, after reduction or translation, in hard copy form.[25]

Although there are five true differences between discovery of electronic information and discovery of traditional hard copy information, only three of these differences require amendments to the Federal Rules. Differences (1) and (3) do not require amendment of the Federal Rules because the Rules already provide guidance for these issues. The cost to retain outside consultants to locate, retrieve, and translate electronic information is just one of many discovery costs that litigants face, and the Rules already address the costs of discovery. Similarly, the Rules provide protection for a party whose site will be inspected. That party may seek a protective order to protect against disclosure of privileged or proprietary information.

A. Electronic Information Is Different Because It Is New

One could claim that discovery of electronic information is different than traditional discovery because it is new. This concept of newness manifests itself in three essential forms. First, courts and practitioners are unfamiliar with discovery of electronic information; therefore, they treat it differently. Second, the parties themselves are unfamiliar with discovery of electronic information and must retain paid, outside experts or consultants to locate, extract, and translate the parties' information. Third, constantly changing information technology and information systems necessarily create a category of outdated or "legacy" information that is obsolete and not readily accessible.

As an initial matter, it is indisputable that discovery of electronic information requires practitioners, parties, and courts to confront new vessels of information, or what one commentator has described as "New Forms of Computer-mediated Communication."[26] These new forms of communication[27] include (a) e-mail and instant messaging,[28] (b) chat rooms and bulletin boards,

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25. *See also* Redish, *supra* note 24, at 589 (noting that "[t]he differences between electronic and traditional discovery can be divided into three categories: (1) volume; (2) retrieval; and (3) translation"); Advisory Committee Memo, May 2004, *supra* note 1, at 21 ("The sheer volume of electronically stored information and the dynamic nature of such information are different from information kept on, and discovered through, paper. The distinctive features of electronic discovery threaten to increase the expense and burden of discovery, and uncertainty as to the applicable standards exacerbates these problems.").

26. Withers, *supra* note 24, at pt. III.B.

27. For a general description of the nature of the internet (at least as of year 2000) and related methods of communicating such as e-mail, instant messaging, chat rooms, and the World Wide Web, see *PSINET, Inc. v. Chapman*, 108 F. Supp. 2d 611, 614-16 (W.D. Va. 2000).

28. "Instant Messaging is a form of electronic communication which involves immediate correspondence between two or more users who are all online simultaneously." *Sedona Principles* 2004, *supra* note 15, at 52. *See also PSINET*, 108 F. Supp. 2d at 615 (describing

(c) the World Wide Web,[29] and (d) voice-mail and other collaboration tools, such as "virtual sticky notes" and "virtual white boards."[30] One of the newest forms of computer-mediated communication is text messaging—sending and receiving silent, electronic text messages through cellular phones, pagers, or similar devices.[31] One can imagine additional technologies that will be in common use in the not-too-distant future.[32]

These new forms of communication have rapidly become commonplace. The number of text messages sent each month in the United States "zoomed from 14.4 million in December 2000 to 1.2 billion in June 2003."[33] A single carrier reported that "by December [2003], it was logging 550 million messages a month."[34] "An estimated 84% of companies in North America used [instant messaging tools] as of March [2003]."[35] By January 2003, "more than 40% of North American financial firms had adopted instant messaging and an additional 17% planned to do so, most within [one year]."[36] As these new forms of communication become pervasive, their regulation becomes

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instant messaging as "communicating and exchanging information with other users on the Internet"); *In re* Aimster Copyright Litig., 252 F. Supp. 2d 634, 640 (N.D. Ill. 2002) (explaining the concept of instant messaging). The *Aimster* court provided the following description:

> Instant Messaging ("IM") is a way for people to communicate instantly over the computer to one or more "buddies" that they specify. . . . Instant Messaging works through the use of a computer program that each individual user downloads to his or her machine. With the program installed, the computer connects to the IM network and the user can specify friends that also have the IM program installed on their computers. The system then alerts the user in real time whenever those friends are online. When a friend is online, the user can send that person an instant message that will pop up on their screen. The users can then chat back and forth in real time using their keyboards. As such, instant messaging is much faster than e-mail. An instant message pops up on the screen unbidden as soon as it is sent from a friend's computer.

Id. at 640 (citation omitted).

29. When a computer accesses the World Wide Web, it records the sites visited and pages viewed by the user. Withers, *supra* note 24, at pt. III.B.2.a (describing cache files, cookies, bookmark files, and downloaded text).

30. *Id.* at pt. III.B.2.c.

31. When communicating through text messages, email, chat rooms, or instant messages, the recipient and sender may not even know each other's names.

32. For example, the use of voice recognition word processing programs increases the likelihood that the information recorded by the computer will differ from the information conveyed by the user. It is possible that the voice recognition program may improperly translate what the user said.

33. Jerri Stroud, *RU N2IT?*, ST. LOUIS POST-DISPATCH, Feb. 6, 2004, at C1.

34. *Id.*

35. Daniel Nasaw, *Instant Messages Are Popping Up All Over*, WALL ST. J., June 12, 2003, at B4.

36. Daniel Nasaw, *Do Not Delete: New Regulations Call for Financial Firms to Save Their Instant Messages; Now They Have to Figure Out What That Means*, WALL ST. J., June 16, 2003, at R8.

commonplace. For example, the New York Stock Exchange recently "told its 336 member firms that it interprets Securities and Exchange Commission regulations to mean that instant messages must be saved just like other business communications, signaling that they may be used as evidence in future regulatory action."[37]

In addition to requiring clients and attorneys to familiarize themselves with new forms of computer-mediated communication, discovery of electronic information now requires them to understand how a computer processes information. "Computers have not only created new forms of substantive communication and facilitated the documentation of conventional forms of communication, computers are busy generating documentation of their own processes."[38] These new sources of electronic documentation include (1) metadata or embedded data,[39] (2) network records,[40] (3) residual or ghost data,[41] and (4) temporary files.[42] These records contain both substantive and foundational information, and some commentators have questioned whether

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37. *Id.*

38. Withers, *supra* note 24, at pt. III.C.

39. Metadata or "embedded data" may include the following: "[t]he date the document was created, the identity of the author and subsequent editors, the distribution route of the document, and even the history of editorial changes." *Id.* at pt.III.C.1; *see also* Scheindlin & Rabkin, *supra* note 4, at 337-38 (defining "embedded" data and describing it as "another form of hidden electronic evidence"); *Sedona Principles* 2004, *supra* note 15, at 52 (defining "metadata"); *Sedona Principles* 2003, *supra* note 14, at 5 n.9 (providing examples of metadata and noting that "[e]-mail has its own metadata elements that include, among about 800 or more properties, such information as dates that mail was sent, received, replied to or forwarded, blind carbon copy ('bcc') information, and sender address book information").

40. *See* Withers, *supra* note 24, at pt. III.C.2 ("Network records may include information about who had access to what data or equipment at any given time; the structure of the files; what documents were distributed to whom, when, and in what form; when backups were performed; and . . . when the network or various parts of it were inoperable.").

41. Residual data or "data that is not active on a computer system" includes "(1) data found on media free space; (2) data found in file slack space; and (3) data within files that has functionally been deleted in that it is not visible using the application with which the file was created, without use of undelete or special data recovery techniques." *Sedona Principles* 2004, *supra* note 15, at 52; *see also* Scheindlin & Rabkin, *supra* note 4, at 337 (outlining the process of computer file deletion and explaining how deleted files may be recoverable as "residual data").

42. "Temporary files," also referred to as "replicant data" or "file clones," include files that are automatically created and periodically stored by the computer program as the user works on the computer and "are intended to help users recover data losses caused by computer malfunction." Scheindlin & Rabkin, *supra* note 4, at 336-337 (citing Joan E. Feldman & Rodger I. Kohn, *The Essentials of Computer Recovery*, *in* PRACTICING LAW INSTITUTE, THIRD ANNUAL INTERNET LAW INSTITUTE 51, 54 (1999)). "For example, if a user accidentally turns off her computer without saving a word processing file, she may be able to recover that file because the computer has saved a recent version of it in a 'temporary file.'" *Id.*

foundational material is discoverable at all.[43]

1. Courts and Practitioners Lack Familiarity with New Technologies

Courts and practitioners treat discovery of electronic information differently than other types of information because they are unfamiliar with these new technologies. Compounding the mystery surrounding electronic information is that much of the information created by computers is not plainly apparent or readily accessible; it is almost always invisible and encoded.[44]

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43. *See, e.g.*, Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 207 (2001) (questioning whether "embedded information" is within "the scope of discovery"); Scheindlin & Rabkin, *supra* note 4, at 347 (arguing that "temporary, backup, cookie, cache and history files" belong to a "*sui generis* family of computer-created information" and arguably, do not constitute "data compilations" within the meaning of the Federal Rules).

Noting "a second major difference" between discovery of electronic information and traditional discovery, Thomas Allman described this difference as

> the entirely new class of "embedded" information that may be available in the electronic discovery world. Obtaining this information, which may include such data as editing histories or creation and access dates, usually requires the application of forensic technologies and can increase discovery costs substantially. It is yet to be seen whether this type of electronic information is within the scope of discovery, and it may be necessary to clarify definitions in the rules relevant to this information.

Allman, *supra* at 207.

44. Scheindlin & Rabkin, *supra* note 4, at 362, 365; *see* ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE § 2.09 (2004) (discussing the possibility that "third-party computer technicians or experts . . . may be necessary in retrieving, searching, or analyzing electronic information"); Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 262-64 (2001) (noting the ease with which some parties have located electronically stored materials but conceding that "[a] more textured view may show that retrieving some older computerized materials—called 'legacy data'—is quantitatively different from and more difficult than, reviewing hard copy materials"); Withers, *supra* note 24, at pt. III.C ("Unlike conventional discovery of paper documents, the sources of electronic documentation, the storage systems, and the mechanisms of retrieval are not readily visible, and most lawyers and their clients are unfamiliar with the workings of their own desktop computers, let alone a computer network.").

According to the Sedona Conference Working Group,

> Simply put, the way in which information is created, stored and managed in digital environments is inherently [and fundamentally] different from the paper world. For example, the simple act of typing a letter on a computer involves multiple (and ever-changing) hidden steps, databases, tags, codes, loops, and algorithms that [simply] have no paper analogue. The interpretation and application of the discovery rules, to date, have not accommodated these differences consistently and predictably so that litigants can efficiently and cost-effectively meet discovery obligations [without risk of unforeseeable sanctions].

Sedona Principles 2004, *supra* note 15, at iii.

Consequently, the act of accessing computer information may change it.[45] The producing party will allege various reasons why producing the electronic information is too difficult to accomplish.[46] Judges (and even attorneys) may accept this reasoning because they do not understand the technology and fail to investigate it.[47]

Yet the fact that the technology is foreign to judges and attorneys does not necessarily mean that discovery of electronic information is different from discovery of more traditional information. The Rules have been applied to varied technological developments without the need for amendment:

> This is hardly the first technological development that has had a major impact on discovery. Reflect for a moment on the technological aspects of law practice in the 1930s, when the Federal Rules were drafted. Not only was there no Internet, there was also no word-processing. Even electric typewriters did not exist, and the photocopier had not been developed. Long distance telephone calls could not be dialed directly either, and there was no commercial jet travel. Nonetheless, by and large the discovery rules have adapted to all of these technological changes. Has the advent of computers and the Internet caused a change of a different magnitude or importance to discovery practices?[48]

The fact that electronic discovery involves frequent technological developments does not mean that the Federal Rules must be amended to address these technological developments. It likely means that courts and attorneys have not familiarized themselves with the technology.

2. Handling of Electronic "Documents" Often Requires the Producing Party to Retain Experts

Production of both hard copy documents and electronic information may require detailed, time-consuming, and expensive efforts to search, locate, and retrieve the information. Although the process may be time-consuming and expensive, a party or its employees can often conduct a search independently and successfully produce the hard copy documents. In contrast, the production of electronic information often requires the producing party to hire experts or outside vendors to locate, translate, and convert such information into a "usable" format.[49] Experts may also be necessary to store and handle the electronic information to protect against unintended changes or destruction of

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45. *Sedona Principles* 2004, *supra* note 15, at 4; *see* Advisory Committee Memo, May 2004, *supra* note 1, at 21.

46. *See* FJC Study *supra* note 11, at 25.

47. *See* Withers, *supra* note 24, at pt. IV.

48. Marcus, *supra* note 44, at 258-59 (footnote omitted).

49. *See id.* at 269-70; Redish, *supra* note 24, at 590; FJC Study, *supra* note 11, at 2.

the information in the process of retrieving it.[50]

The costs to retain these outside experts can be significant. In one recent case, the parties argued over who should bear the cost to search and restore seventy-seven backup tapes that contained the e-mails of five individuals over a five-month period.[51] Based on a sampling of five backup tapes, the outside vendor's fees were estimated to be more than $165,000.[52] The need to hire outside vendors to locate, gather, and translate electronic information is arguably unique to discovery of electronic information and constitutes a true "difference" from traditional discovery. Therefore, one must consider whether this "difference" requires an amendment to the Federal Rules.

An amendment to the Federal Rules is unnecessary for two reasons. First, the act of hiring an outside vendor does not require guidance from the Federal Rules. Parties are free to determine how they wish to bear the burden of responding to discovery. For example, many litigants, especially those involved in document-intensive cases, utilize outside vendors to assist in the process of locating, gathering, and producing responsive hard copy documents. At a minimum, many litigants elect to use outside vendors to apply "Bate" labels to their documents and to copy them. The Federal Rules do not need to be amended to address the hiring of outside vendors for electronic discovery or traditional paper discovery. Second, the Federal Rules already account for significant costs and expenses in discovery.[53] The Federal Rules permit the responding party to object to production of electronic information on the grounds that the cost to retrieve and produce such information does not justify

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50. *See* Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 8; *Sedona Principles* 2003, *supra* note 14, at 5. The Sedona Conference Working Group noted how

> computer information, unlike paper, has dynamic content that is designed to change over time even without human intervention. . . .
>
> . . . .
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> . . . [E]lectronic documents are more changeable than paper documents. Documents in electronic form can be modified in numerous ways that are sometimes difficult to detect without computer forensic techniques. Moreover, the act of merely accessing or moving electronic data can change it.

Id.

51. Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 281-82 (S.D.N.Y. 2003) (Zubulake III).

52. *Id.* at 283. Defendant spent $11,524.63 for an outside vendor to restore and search for e-mails contained on five backup tapes. *Id.* at 282-83. To arrive at this total expenditure, the outside vendor billed (a) 37.5 hours at $245 per hour "for its restoration services," (b) 101.5 hours at a rate of $18.50 per hour for use of the outside vendor's computer systems, and (c) a five-percent overhead fee, for a total cost of $11,524.63. *Id.* Because the five backup tapes that were searched constituted the backup tapes that contained the e-mails for one individual for a five-month period, this was only a sample of the seventy-seven backup tapes containing potentially responsive e-mails from five individuals over a five-month period. *Id.* at 281-83. The court determined that "the total cost of restoring the remaining seventy-two tapes extrapolates to $165,954.67." *Id.* at 287.

53. *See* discussion *infra* Sections IV.B, VI.C.1.

its discovery. Alternatively, the producing party may seek to shift costs to the requesting party.

3. Legacy Data Is Unique to Electronic Data

The advent of new technology creates an additional problem for electronic discovery: the difficulty of obtaining data from obsolete systems.[54] Many businesses regularly update or change the software or the hardware that they employ.[55] In addition, many businesses migrate to new technology once an "industry standard" has developed. However, industry standard technology may eventually become obsolete over time as new technologies replace the industry standard. The information contained on obsolete systems is often called "legacy data."[56] Legacy data has been compared to "documents written in a dead language" that require a specialized translation to be useful.[57] Even if one has access to the information, it cannot be read because the hardware or software necessary to read it is no longer available.[58] Turnover in personnel familiar with the obsolete systems may compound the difficulties created by legacy data.[59]

Retrieving these obsolete, computerized materials is arguably "qualitatively different from, and more difficult than, reviewing hard copy materials."[60] The Federal Rules, however, already address the difficulty in translating electronic information into usable form and place the burden and cost on the producing party. Rule 34(a) defines the scope of "documents" that may be inspected as "including . . . other data compilations *from which information can be obtained, translated, if necessary, by the respondent*

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54. FJC Study, *supra* note 11, at 12.

55. *Sedona Principles* 2003, *supra* note 14, at 4-5 ("[T]he frequent obsolescence of numerous computer systems due to changing technology creates unique issues for recovering electronic documents that are not present in paper documents. It is not unusual for an organization to undergo several migrations of data to different platforms within a few years.").

56. *See id.* at 42 ("Legacy Data is information the development of which an organization may have invested significant resources and has retained its importance, but has been created or stored by the use of software and/or hardware that has been rendered outmoded or obsolete."); Withers, *supra* note 24, at pt. III.D.1.

57. Withers, *supra* note 24, at pt. III.D.1. Another analogy might be shorthand notes written by a party's former employee in a form of shorthand that cannot be translated by any current employee. Is there any argument that the party responding to discovery is under an obligation to have such notes "translated" by a linguist?

58. *Id.*

59. Recall that videocassette recorders at one time were sold in Betamax format as well as VHS. One might be able to locate and purchase a Beta player on Ebay or another auction site, but Sony no longer manufactures the Betamax. With the advent of DVD players, VCRs may become obsolete.

60. Marcus, *supra* note 44, at 263.

through detection devices into reasonably usable form."[61] The Rules do not, however, directly address legacy data, and one must consider whether legacy data is unique and different—even from other electronic information—because it is not readily translatable. The Federal Rules assume that the electronic information can be translated "through detection devices into reasonably usable form."[62] The Advisory Committee Notes further explain that "when the data can as a practical matter be made usable by the discovering party only *through respondent's devices*, respondent may be required to use *his devices* to translate the data into usable form."[63] The Advisory Committee Notes therefore assume that the responding party can readily translate the information through its existing devices.

There will be instances in which the responding party will not have the technology to translate the information into usable form and the Federal Rules fail to address this problem of legacy data. This omission in the Federal Rules prompts the following questions: Is the responding party obligated to produce legacy data? Is the responding party obligated to obtain technology that makes it possible to search the legacy data for relevant information? If the responding party is obligated to produce such information, is it also obligated to "translate" such material into usable form? At what cost?

This Article argues that legacy data, like other information that is "not reasonably accessible," need not be produced absent a court order for good cause.[64] Of course, the responding party may nevertheless obtain the means to translate the information. If the responding party discovers how to translate the information to determine, for example, whether any of the information is relevant, privileged, or proprietary, the responding party must produce the translated electronic information.

B. Discovery of Electronic Information Increases the Likelihood of Inadvertent Disclosure of Privileged Information

One of the reasons most frequently cited by those who favor amending the Federal Rules to address discovery of electronic information is the likelihood of inadvertent disclosure of privileged information.[65] Aside from the possibilities that a party cannot translate or manage its own computer information,[66] however, there is nothing unique about electronic information

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61. FED. R. CIV. P. 34(a) (emphasis added).

62. *Id.*

63. *Id.* at advisory committee's notes on 1970 amendment (emphases added).

64. *See infra* Section VI.C.

65. *See, e.g.*, Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 14-16; FJC Study, *supra* note 11, at 2; *Sedona Principles* 2003, *supra* note 14, at 33.

66. For a discussion on whether this claim is a variant of the argument that parties, lawyers and courts are unable to understand electronic information and therefore unable to properly conduct a review for privileged materials, see *supra*, Section III.A. For a discussion

that prevents a party or its attorneys from conducting an appropriate and effective review for privileged communication. On the contrary, in many instances it will be easier to review electronic information to determine the foundational factors that go into an analysis of privilege—who created the information, who edited it, who received the document, and when all of this occurred. Thus, the issue of inadvertent disclosure of privileged information pervades discovery of all types of information and does not represent a difference between discovery of electronic information and discovery of hard copy information.

C. Electronic Information Often Requires On-Site Inspection of a Party's Computer System by an Opposing Party

Discovery of computerized information often requires the on-site inspection of a party's computer system by an opposing party.[67] The need for an on-site inspection is not, by itself, unique to discovery of electronic information. Rule 34 permits a party to "inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served."[68] The requesting party, may inspect—and in some cases may test destructively—machinery, materials, soils, and other physical objects that are relevant to the dispute.[69]

The difficulty in segregating privileged or proprietary information from view during such an inspection is, however, arguably unique to discovery of computer information.[70] In some cases it is impossible to separate the responsive, discoverable information from the computer environment necessary to support the information. The electronic evidence itself may contain proprietary characteristics.[71] In addition, the software that is necessary to operate the computer may contain proprietary information of the responding party or of a third party. Consider the following example set forth by one commentator:

> [I]magine a lawsuit between two pizza companies involving a garden-variety commercial dispute. A request is made for all documents regarding the time and location of sales of delivered pizzas during 1999. The respondent, unbeknownst to its competitors in the industry (including the propounding party), keeps a fully-customized computerized data base of its customers, including not only the information sought by the document request (the time

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on whether this claim is based on the volume of electronic information overwhelming the parties such that they cannot review the materials, see *infra* Section III.F.

67. *See* Marcus, *supra* note 44, at 269; FJC Study, *supra* note 11, at 2, 11.

68. FED. R. CIV. P. 34(a).

69. *Id.*

70. *See* Scheindlin & Rabkin, *supra* note 4, at 348, 362-63.

71. *See id.*

> and location of pizza sales), but also related information about the customer's drink and dessert of preference. This information is used to increase customer goodwill, the efficiency of the pizza delivery system and forms the backbone of the respondent's direct marketing initiative. Furthermore, this information is collected by way of a Web site that allows customers to order their delivered pizzas on-line. For purposes of the example, let us assume the idea of using computers to increase pizza sales in this manner is both startlingly innovative and remarkably effective.
>
> In this example, the data regarding the time and location of pizza sales are discoverable. However, the respondent's "code," and indeed, the very existence of a computerized customer information data base, represents a valuable trade secret. If the respondent is required to produce its discoverable electronic documents as well as the code used to translate those documents into usable form, it will in effect be producing its most closely protected proprietary information. Alternatively, it might be that the respondent pizza company's custom data base was sold to it by a third party under a licensing agreement that prohibits disclosure of the data base program to a third party without additional payments to its author.[72]

The foregoing scenario might apply to a simple document request in a dispute between any two small competing businesses. Similarly, any document request may call for production of proprietary information belonging to a third party.[73]

Although on-site inspection of a party's computer is arguably "unique" to electronic discovery, the problem created by such an inspection—discovery of privileged or proprietary information—is not unique. Many businesses retain competitive, proprietary information, such as customer lists and customer preferences, in hard copy. The requesting pizza company, for example, might have a simple Rolodex with the drink and dessert preferences or delivery preferences of its customers (e.g., "go around garage to back door and knock loudly"). The Federal Rules address and resolve this problem by permitting the responding party to object and seek a protective order.[74] Whether to grant a protective order and the scope of the order if granted are issues that must be decided on a case-by-case basis.[75] Furthermore, when it is

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72. *Id.* at 363 (footnote omitted).

73. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446, at 80 (2004). For example, an insurer may have purchased actuarial tables from a third party. The purchase agreement may permit the responding party to use those tables in their work and to enter them into their database and software programs, but the purchase agreement may prohibit their disclosure to anyone other than the purchasing party.

74. FED. R. CIV. P. 26(c).

75. *See, e.g.*, Dove v. Atl. Capital Corp., 963 F.2d 15, 19 (2d Cir. 1992) ("The grant and nature of protection is singularly within the discretion of the district court . . . ."); FTC v. Lonning, 539 F.2d 202, 211 (D.C. Cir. 1976) ("The decision as to the type and scope of any protective order rests within the sound discretion of the trial judge and must be determined on a case by case basis.").

impossible to segregate privileged or proprietary information, the court may appoint a neutral expert to conduct the inspection.[76]

D. Spoliation of Electronic Information

Commentators and practitioners have noted how the Federal Rules fail to provide guidelines for retention of electronic information while a lawsuit is pending.[77] One concern is simply that spoliation and preservation problems will "multiply"[78] given the increase in the volume of information that is created and stored electronically. This concern, however, is not unique to electronic information. Spoliation and preservation issues also arise when a party generates a large quantity of hard copy documents in the normal course of its business.

Another concern is the ease with which electronic files may be altered or destroyed unintentionally. For example, the very act of reviewing a file "may fundamentally change an important characteristic, such as automatically-generated dates or calculations of interest."[79] Furthermore, "computer information, unlike paper, has dynamic content that is designed to change over time even without human intervention."[80] For example, a computer record showing inventory may be linked to a register or scanner that automatically updates inventory based on sales or receipt of new inventory.

Yet the Federal Rules already contain provisions that can be used to prevent the loss or alteration of such evidence. For instance, parties may seek a data preservation order.[81] Preservation orders, however, must be implemented very carefully to avoid a host of unintended consequences:

> For example, a preservation order to save "all records pertaining to the manufacture of X" could, if all documents were paper documents, be applied logically by a party, which could instruct employees to collect and preserve those reports. In the electronic age, such a command could present intractable problems. Because electronic information is both dynamic (*i.e.*, constantly changing) and ubiquitous, short of suspending operations, all electronic data, wherever located and in whatever form, will have to be

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76. *See* FED. R. CIV. P. 26(c).

77. *See* Marcus, *supra* note 44, at 267-68; FJC Study, *supra* note 11, at 2; *Sedona Principles* 2003, *supra* note 14, at 5-6; Withers, *supra* note 24, at pt. III.E.1. For a recent decision addressing parties' preservation obligations with respect to electronic information, see Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (Zubulake IV).

78. Marcus, *supra* note 44, at 267-68.

79. Withers, *supra* note 24, at pt. III.E.1; *see also Sedona Principles* 2003, *supra* note 14, at 5 (noting how "accessing or moving electronic data"; "booting up a computer"; or "moving a word processing file from one location to another" can change electronic data).

80. *Sedona Principles* 2003, *supra* note 14, at 5; *see* Advisory Committee Recommendations, *supra* note 1, at 3, 7.

81. *See* FED. R. CIV. P. 26(c).

> copied so that reports can be generated as needed in the future. That process could be extraordinarily complex and expensive, depending upon the size of the data involved, since it is typically impossible to suspend destruction of only the information covered by the preservation order.[82]

Thus, an amendment to the Federal Rules may be necessary to address a litigant's obligations to preserve dynamic electronic information. To avoid allegations of spoliation (even in the absence of a preservation order), businesses need certainty with respect to their records-management policies. They want the certainty of knowing that if they follow a set of prescribed records-retention guidelines, they will not be subject to sanctions for spoliation of evidence.[83]

E. Form of Production Issues

Discovery of electronic information forces parties to confront the following question: In what form must the responding party produce the information?[84] The electronic information can be produced in its native, electronic format or it can be printed to paper and then produced. Each possibility has corresponding benefits and drawbacks. Producing the information in an electronic format may (1) reduce the receiving party's costs to process the information; (2) increase the utility of the information; and (3) disclose responsive, but otherwise hidden, information such as metadata.[85] On

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82. *Sedona Principles* 2003, *supra* note 14, at 6; *see also* MANUAL FOR COMPLEX LITIGATION, *supra* note 73, § 11.442, at 73 ("Continued operation of computers and computer networks in the routine course of business may alter or destroy existing data, but a data preservation order prohibiting operation of the computers absolutely would effectively shut down the responding party's business operations."); Withers, *supra* note 24, at pt. III.E.1 ("[T]he information system must be frozen in time to preserve the discoverable evidence, without crippling the organization in the process. This may be accomplished by creating 'images' of the disks and other data storage media, and basing discovery on the images, rather than the active files.").

83. Such a provision has been referred to as "a 'safe harbor' for preservation of electronic data." Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 16; *see also* Advisory Committee Memo, May 2004, *supra* note 1, at 21 ("Much of the discussion heard at the Fordham Conferences and other meetings supporting a limited safe harbor emphasized the need for balancing the need for litigants to obtain information and the need of every organized entity, public and private, to continue the routine operations of computer systems.").

84. *See* FJC Study, *supra* note 11, at 14; Withers, *supra* note 24, at pt. III.G.

85. *See* Withers, *supra* note 24, at pts. III.C.1, III.G.3; *see also* Memorandum from Richard L. Marcus, Special Consultant to the Discovery Subcommittee, to experienced lawyers invited to provide advice to the Discovery Subcommittee 8 (Sept. 2002) (on file with author) [hereinafter Marcus Rule Changes Memo, Sept. 2002] ("To make the materials usable by the receiving party might require that they be reformatted (possibly costly to the producing party) or that the producing party provide computer programs (perhaps subject to legal protections) to the receiving party.").

the other hand, production of information in electronic form may result in production of information in a form that cannot be read by the opposing party. For example, an individual plaintiff may not have the software to read and process the information created by a large company that uses e-mail, word processing software, spreadsheets, and even internally created databases.[86] Directing the producing party to provide information in electronic form increases that party's costs to review the metadata and other hidden information.[87] This form of production also increases the likelihood that the information will be altered (intentionally or otherwise) or that a dispute will arise over the nature or content of the information.

Production of electronic information in hard copy form increases costs to both the producing party and the requesting party because it requires the parties to print out and retain hard copies of computer information, much of which may be irrelevant.[88] On the other hand, because hard copy documents lack the metadata and dynamic nature of spreadsheets and databases, the task of reviewing the documents for hidden electronic information is unnecessary.

The Federal Rules provide that the producing party must translate electronic information "into reasonably usable form."[89] But the Rules do not resolve the question of whether the producing party must produce electronic information in both electronic and hard copy forms. If the information must be produced in only one form, the Rules do not address which party chooses the form of production. The form of production is therefore one area in which electronic information raises unique issues that may be addressed by amending the Federal Rules of Civil Procedure.

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86. A litigant might not even own a computer. This possibility must be balanced against the reality that the litigant will rarely be responsible for reviewing the information. The plaintiff's lawyer will conduct the review; therefore, the extent of the plaintiff's lawyer's resources may be relevant to the inquiry. *See* Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 288 (S.D.N.Y. 2003) (Zubulake III) (noting that when conducting an evaluation of the cost of production compared to each party's resources, "it is not unheard of for plaintiffs' firms to front huge expenses when multi-million dollar recoveries are in sight").

87. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 73, § 11.446, at 80 ("In a computerized environment, the relative burdens and expense shift dramatically to the responding party.").

88. *See id.* The economic impact, however, is not clear. It has been my experience that I can review a box of documents for relevance, privilege, and proprietary information many times faster than I can review the same number of documents on a computer screen by clicking through each page. This may be one reason to explain "the continuing preference of attorneys to print out discovery documents, even if they were generated and stored electronically, for inspection by the opposing party." Withers, *supra* note 24, at pt. III.G.1. This preference "has resulted in a diseconomic pattern of 'electronic to paper to electronic to paper,' in which producing parties print out their clients' electronic documents to allow inspection of the resulting paper, and requesting parties digitally scan the paper, ultimately printing out the images for trial preparation." *Id.*

89. FED. R. CIV. P. 34(a).

F. Increased Volume and Cost

Commentators have frequently claimed that compared to hard copy discovery, electronic discovery produces a greater volume of electronic information.[90] Numerous reasons exist for this difference between the two forms of discovery. For example, electronic documents are easily copied, distributed, and manipulated[91] and are ordinarily stored in multiple locations.[92] Compared to paper documents, electronic information is much cheaper to create and store.[93] Adding to the volume of information is the "Vampire Effect," whereby "deleted" documents are not in fact actually deleted, but instead "will always return."[94] Finally, as litigants and their attorneys grow

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90. *See, e.g.*, William S. Gyves, *Electronic Discovery Is a Fact of Life: Coming to Terms with the Nuances-and-Costs of Discovery in Complex Litigation*, N.J. L.J., Apr. 29, 2002, at S-5 (discussing the significant costs of electronic discovery); Shira A. Scheindlin & Jeffrey Rabkin, *Outside Counsel: Retaining, Destroying and Producing E-Data: Part 2*, N.Y. L.J., May 9, 2002, at 1 (2002) ("Consider, for example, e-mail messages saved on a computer hard drive. In 1994, Americans collectively sent 100 million e-mails daily, and that number rose to 500 million e-mails per day in 1998. Research indicates that in 2002, Americans will send 1.5 billion e-mail messages every day."); Advisory Committee Memo, May 2004, *supra* note 1, at 21 ("The sheer volume of electronically stored information and the dynamic nature of such information are different from information kept on, and discovered through, paper."); Advisory Committee Recommendations, *supra* note 1, at 2-3; Withers, *supra* note 24, at 4-5 (discussing how a survey of "nearly 200 writings on electronic discovery and evidence, ranging from ponderous academic law review articles to mass-circulation press reports, radio, and television" led to the conclusion that "[e]lectronic discovery is almost universally perceived in the legal and popular literature as something voluminous").

91. *See* Scheindlin & Rabkin, *supra* note 4, at 364-66; *Sedona Principles* 2003, *supra* note 14, at 3-5; Withers, *supra* note 24, at pt. III.A.1; *see also* Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (noting that electronic data is so voluminous because, in contrast to hard copy documents, "the costs of storage are virtually nil" and concluding that "[i]nformation is retained not because it is expected to be used, but because there is no compelling reason to discard it").

92. *See* Marcus, *supra* note 44, at 266-67; Withers, *supra* note 24, at pt. III.A.2; *see also* Allman, *supra* note 43, at 207 ("The costs, including the burden and inconvenience to the ordinary operation of a business enterprise, could be enormous if all possible locations must be searched.").

93. *See* Scheindlin & Rabkin, *supra* note 4, at 366-67; *Sedona Principles* 2003, *supra* note 14, at 3-4; Withers, *supra* note 24, at pt. III.A; *see also* MICHAEL R. OVERLY & CHANLEY T. HOWELL, DOCUMENT RETENTION IN THE ELECTRONIC WORKPLACE 2-3 (2001) (noting how the dramatically decreasing costs of storage for electronic information leads some businesses "to never delete any information stored electronically" and to "prefer simply to keep everything 'online' for ready retrieval in the event something is needed").

94. Withers, *supra* note 24, at pt. III.A.4; *see* Marcus, *supra* note 44, at 265 (explaining how the "'delete' function" is misleading because "the hard drive of every computer still has on it the electronic materials that the user considers long gone"); *Sedona Principles* 2003, *supra* note 14, at 4-5 (comparing the difficulty of deleting electronic information with the ease of destroying paper documents). *But see* Marcus, *supra* note 44, at 266 ("[B]efore computers

more sophisticated and more familiar with discovery of electronic information, they learn to demand and expect discovery of more information from more locations.

As the volume of discoverable material increases, the costs and burdens of discovery increase.[95] Arguably, some of these costs will be unique to electronic discovery.[96] Other costs will be the "same costs as traditional discovery, but in considerably intensified form."[97] In addition, the costs of electronic discovery fall disproportionately on the responding party.[98] Yet the complaint that discovery entails excessive costs is not unique to electronic discovery.[99] Subsections (b) and (c) of Rule 26 already include a

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came along, some documentary pack rats kept drafts as well as the final document, and these drafts could be located with enough effort. On second thought, then, the break with the past does not seem to be so striking."). Describing the "vampire effect," Ken Withers explained:

> This effect is attributed to the method used by most computer operating systems to "delete" a document, which is to rename the file and remove it from the internal directory, designating the physical space that it occupies available to be overwritten by new data. The literature points out that such "deleted" data are almost always recoverable, as complete overwriting of every copy and every variation of a document at every location it may be found seldom occurs.

Withers, *supra* note 24, at pt. III.A.4.

95. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311 (Zubulake I) ("The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, 'discovery is not just about uncovering the truth, but also about how much of the truth parties can afford to disinter.'" (quoting *Rowe*, 205 F.R.D. at 423)); Advisory Committee Memo, May 2004, *supra* note 1, at 21 ("The distinctive features of electronic discovery threaten to increase the expense and burden of discovery . . . ."); *see also Zubulake I*, 217 F.R.D. at 316 (implying that the tension between the "broad scope of discovery prescribed in Rule 26(b)(1) [and] the cost-consciousness of Rule 26(b)(2)" has led courts to "devis[e] creative solutions for balancing" these two aspects of discovery).

96. For example, a litigant and her attorneys may require training to operate the hardware and software necessary to support the electronic information produced by their adversary. Additionally, if neither the attorneys nor the litigant own or lease such technology, this unique cost may increase.

97. Redish, *supra* note 24, at 608 ("One is able to predict that as a categorical matter electronic discovery is likely to give rise to new and significant costs and burdens unseen in traditional discovery and to some of the same costs as traditional discovery, but in considerably intensified form.").

98. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 73, § 11.446, at 80 (noting how

> [i]n a computerized environment, the relative burdens and expense shift dramatically to the responding party. The cost of searching and copying electronic data is insignificant. Meanwhile, the tremendously increased volume of computer data and a lack of fully developed electronic records-management procedures have driven up the cost of locating, organizing, and screening data for relevance and privilege prior to production.).

99. *See* Marcus, *supra* note 44, at 261 (observing that

> [t]hose who would argue on cost grounds that the discovery of computerized material calls for a new rule regime must keep in mind that the case has already been made repeatedly that conventional discovery imposes huge costs. Therefore, the costs of the new

proportionality test to determine whether the costs of discovery should limit or deny discovery.[100] Thus, one must consider whether the increased costs of electronic discovery are so much greater in magnitude than the costs of traditional discovery that they require amendment of the Federal Rules.[101]

IV. RULES 26 AND 34 PRESENTLY ADDRESS THE DISCOVERY OF ELECTRONIC INFORMATION

Before addressing the Advisory Committee's proposed changes, it is helpful to consider the ways in which the Federal Rules and their accompanying Advisory Committee Notes already explicitly address the discovery of electronic information.

A. Electronic Documents Are Discoverable and, in Some Cases, Must Be Translated

Rule 34(a) clearly provides that, subject to the general limitations imposed on all discovery, computerized and electronic data constitute discoverable

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technology might justify the new rulemaking only if they were larger by an order of magnitude.).

Others, mostly defense counsel, argue that the increased costs of electronic discovery has a disproportionate impact on large corporate defendants. "Individual shareholders or consumers suing a corporation, for example, are likely to have no electronic records of their own, but they (and their lawyers) may be able to gain access to thousands (perhaps millions) of records in the corporation's files with relatively little effort." Steven C. Bennett & Thomas M. Niccum, *Two Views from the Data Mountain*, 36 CREIGHTON L. REV. 607, 618 (2003) (citing Linnen v. A.H. Robins Co., No. 97-2307, 1999 Mass. Super. LEXIS 240, at *2, *16-17, *36 (Mass. Super. June 15, 1999)); *see also* Marcus, *supra* note 44, at 270-71 (discussing the concern over "one-way discovery," a claim made by "[o]rganizational litigants, usually in the defensive posture, . . . that individual plaintiffs can make unlimited discovery demands without facing any real burden in responding because they have such limited information"). *But see* Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 547-48 (1998) (noting that a 1997 study of discovery practice by the Federal Judicial Center found that in the more costly cases (the top five percent), plaintiffs paid approximately one-third more in discovery costs than defendants).

100. *See infra* Section VI.C.1.a.

101. *See* Redish, *supra* note 24, at 581. Professor Redish, noting the "enormous technological differences between electronic and traditional discovery," stated the following conclusions:

> First, because of its unique technological aspects, electronic discovery creates substantial practical difficulties that do not arise in the context of traditional discovery. Second, the costs and burdens that result from these difficulties can be of such a magnitude as to have a profound and unpredictable impact on basic societal choices not directly involving the lawsuit.

Id.

"documents."[102] The 1970 amendments to Rule 34(a) defined the scope of "documents" as "including writings, drawings, graphs, charts, photographs, phonorecords, and *other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.*"[103] The Advisory Committee's Notes explain that a requesting party may be entitled to inspect electronic and computer data and even the responding party's computer:

> The inclusive description of "documents" is [included] to accord with changing technology. It makes clear that Rule 34 applies to electronics [sic] data compilations from which information can be obtained only [through] the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. . . . Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.[104]

Thus, Rule 34(a) equates electronic "documents" with hard copy documents in one respect; both are subject to discovery through the use of a document request. Rule 34(a) goes one step further, however, and distinguishes the discovery of electronic information by providing that only "data compilations" are required to be "translated, if necessary, by the respondent through detection devices into reasonably usable form."[105] There is no similar requirement for hard copy documents.[106]

In 1993, Rule 26(a)(1)(B) was amended to require parties to disclose, without awaiting formal discovery requests, certain basic information,

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102. FED. R. CIV. P. 34(a).

103. *Id.* (emphasis added).

104. *Id.* at advisory committee's notes on 1970 amendment.

105. FED. R. CIV. P. 34(a).

106. For example, the responding party is not required to translate hard copy documents written in another language into English. *See In re* P.R. Elec. Power Auth., 687 F.2d 501, 508 (1st Cir. 1982) (stating that

> [t]he rule speaks specifically only of "data compilations" translated through "detection devices." There is no hint of a more general principle requiring respondents to translate documents not written in the discovering party's native tongue—nor, indeed, would there be any need to so extend the rule given the general availability of translators.);

see also In re Fialuridine Prod. Liab. Litig., 163 F.R.D. 386, 387-88, 388 n.3 (D.D.C. 1995) (rejecting the defendant's contention that the plaintiffs' request for production of documents written in Spanish requires translation of documents and noting that "[defendant] need not formally translate the documents to sanitize them . . . [defendant], the one who created the documents in the foreign language, would have better access to people who could review the documents for privileged and proprietary information").

including "all documents, *data compilations*, and tangible things . . . that the disclosing party may use to support its claims or defenses, unless solely for impeachment."[107] The Advisory Committee's Notes clearly state that the phrase "data compilations" includes "computerized data and other electronically-recorded information."[108]

Based on the language of Rules 26(a)(1)(B) and 34(a), the courts have held that electronic information is discoverable. District Court Judge Shira Ann Scheindlin, who is also a member of the Advisory Committee on Federal Rules of Civil Procedure, has noted the "accepted principle . . . that electronic evidence is no less discoverable than paper evidence."[109] In fact, the Advisory Committee has stated that "courts have generally not had difficulty concluding that electronically stored information is properly a subject of discovery."[110] Although it is clear that electronic information is discoverable, the general restrictions on the scope of discovery that apply to non-electronic information also apply to electronic information.

B. Rule 26(b)(2) Sets Forth Limitations Applicable to Discovery of All Types of Information

Rule 26(b)(1) defines the scope of discovery to encompass "any matter, not privileged, that is relevant to the claim or defense of any party."[111] The scope of discovery may be limited by the court—acting on its own initiative or pursuant to a motion—if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery . . . to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the

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107. FED. R. CIV. P. 26(a)(1)(B) (emphasis added).

108. *Id.* at advisory committee's notes on 1993 amendment ("[T]he disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information . . . .").

109. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) (Zubulake I); *see also* Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 8 (discussing proposed amendments to the Federal Rules that will "make the rule language consistent" with judicial interpretation of discovery of electronically stored information).

110. Advisory Committee Memo, May 2004, *supra* note 1, at 26.

111. FED. R. CIV. P. 26(b)(1). "Discovery is driven by relevance, modified in appropriate cases by logistical and cost concerns, not the other way around." John L. Carroll & Kenneth J. Withers, *Observations on "The Sedona Principles"* 3, *at* http://www.kenwithers.com/articles/sedona/observations.pdf (Apr. 10, 2003).

importance of the proposed discovery in resolving the issues.[112]

Even if the requested information is discoverable, the court has discretion under Rule 26(c) to issue orders protecting the responding party from "annoyance, embarrassment, oppression, or undue burden or expense" in complying with the discovery requests.[113] The United States Supreme Court has held that such orders may include "orders conditioning discovery on the requesting party's payment of the costs of discovery."[114]

Thus, the Discovery Subcommittee's proposals must be considered in light of the following conclusions: (1) the Federal Rules already explicitly address discovery of electronic information, and (2) they contain no exception that precludes their application to discovery of electronic information.

V. INSTITUTIONAL REASONS TO DECLINE AMENDING THE FEDERAL RULES

Without considering the specific proposals that the Advisory Committee has recommended, there are numerous legitimate reasons not to amend the Federal Rules—or at least to delay consideration of electronic discovery issues. This Section considers some of the institutional reasons for not amending the Federal Rules at this time.

A. Changes to the Discovery Rules Should Not Be Limited to Discovery of Electronic Information

Over the years, critics have suggested scrapping and rewriting all of the discovery rules. In particular, the calls for reform have pointedly indicated that mere revision of the Federal Rules is insufficient because "tinkering changes will delay for years the adoption of genuinely effective reforms."[115]

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112. FED. R. CIV. P. 26(b)(2). The Advisory Committee's Notes for the 1983 amendments state:

> The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

Id. at advisory committee's notes on 1983 amendment.

113. FED. R. CIV. P. 26(c).

114. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

115. Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 998 (1980) (Powell, J., dissenting) (opining that the amendments fail to accomplish necessary reforms to

Thus, amendments to the Federal Rules should be rejected to the extent that they are limited to the discovery of electronic information.

B. The Lack of Sufficient Information or Experience Prevents Effective Amendment of the Federal Rules

From 1997 to 1999, the Discovery Subcommittee considered whether to propose changes to the Federal Rules that would address the discovery of electronic information. Ultimately, it elected not to do so:

> First, the subject was new and the dimensions of the problem, if any, were not clear. Second, it was not clear whether these discovery problems were so distinctive as to justify special treatment in the rules. Third, there were few, if any, models for responding by rule to these issues. Fourth, it seemed that the terrain was constantly shifting, and that a rule amendment might be overtaken by technological or other developments.[116]

This same reasoning applies today. Five years is not a significant passage of time and the discovery problems any amendments would address are still not clearly defined. Furthermore, because computer technology changes so rapidly, amendments being considered today will likely be obsolete before they are enacted. Finally, "there may be institutional grounds for caution. The discovery rules have been the most amended rules of the last quarter century, and yet another set of amendments has just been adopted."[117]

C. Case Law Can Effectively Address the Issue of Electronic Discovery

Most, if not all, of the issues raised by the Advisory Committee could be addressed through case law. "[F]ederal judges already have many tools to solve discovery problems, and as they confront new problems they can adapt those tools and memorialize their results in decisions that can guide other judges."[118] Even those commentators who have suggested that the Federal

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control "serious and widespread abuse of discovery" (quoting A.B.A. Sec. of Litig., *Second Report of the Special Committee for the Study of Discovery Abuse* 5 (1980))).

116. Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 2. According to Professor Marcus, "Ideally, a procedural system should be designed so that it can cope with technological (and other) developments without a major overhaul, and perhaps without any revision." Marcus, *supra* note 44, at 253.

117. Marcus, *supra* note 44, at 280. Similarly, the Advisory Committee on Evidence Rules recently considered whether to amend the Federal Rules of Evidence "to address problems generated by the use of computerized materials as evidence." *Id.* at 273. The committee concluded, however, that no changes were warranted because there was "no indication that the courts were having a problem with these issues" and "changing so many rules might confuse matters." *Id.* at 273 n.106.

118. Marcus Rule Changes Memo, Sept. 2002, *supra* note 85, at 2.

Rules should be amended admit that change "could be, in theory, accomplished through the development of case law. For example, courts could rationally interpret the term 'document' to include all forms of electronic evidence and also could effectively 'read in' the suggested addition to Rule 34(b)."[119]

Nonetheless, those same commentators argue against allowing case law development to run its course. They argue that waiting for case law development may result in a long wait, few decisions, and little clarity.[120] Discovery orders are interlocutory orders; therefore, they are not subject to immediate appeal. "Because discovery orders are rarely reviewed by the appellate courts, this body of law has been developed almost entirely by decisions of district and magistrate judges that are not controlling precedent even within their own district—a fact that disfavors uniformity."[121]

The same commentators also argue that "such an approach would necessarily involve courts in the resolution of discovery disputes, cutting against the grain of the Rules' general goal of promoting extrajudicial discovery practice."[122] Their position, however, is in conflict with recent amendments to the Federal Rules that encourage judges to become more proactive in managing discovery and in establishing the proper scope of discovery.[123] Thus, courts should resolve any issues relating to electronic discovery through application and interpretation of the existing Federal Rules.[124]

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119. Scheindlin & Rabkin, *supra* note 4, at 378. The Advisory Committee noted that "courts have generally not had difficulty concluding that electronically stored information is properly a subject of discovery, [and that the proposed amendments] make the rule language consistent with practice." Advisory Committee Memo, May 2004, *supra* note 1, at 26. If the Advisory Committee is correct about its observation, why should we amend the Federal Rules to make them consistent with the manner in which they are already being interpreted?

120. Scheindlin & Rabkin, *supra* note 4, at 378.

121. *Id.* at 351. The delay in waiting for case law development must be balanced against the fact that the rule amendment "process takes a minimum of about three [to four] years after drafting begins." Marcus Rule Changes Memo, Sept. 2002, *supra* note 85, at 2.

122. Scheindlin & Rabkin, *supra* note 4, at 378.

123. *See* FED. R. CIV. P. 1 advisory committee's notes on 1993 amendment ("The purpose of this revision, adding the words 'and administered' to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay."); *see also* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?* 7 TUL. J. INT'L & COMP. L. 153, 163 (1999) (noting that "the 'proportionality' provisions" clarified the responsibility of judges to manage the scope of discovery). Rule 26(b)(1) was amended in 2000 to reiterate that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii) and (iii)." FED. R. CIV. P. 26(b)(1) and advisory committee's notes on 2000 amendment.

124. In September 2002, Professor Marcus suggested that addressing electronic discovery in revisions of the Civil Litigation Management Manual and the Manual for Complex Litigation could be preferable to amending the Federal Rules. Marcus Rule Changes Memo, Sept. 2002,

D. The Absence of a Clear Demand to Amend the Federal Rules to Address Discovery of Electronic Information

Amendments to the Federal Rules are not warranted today because there is no clear demand for reform. In its case study of electronic discovery issues, the Federal Judicial Center found that seven out of the ten judges interviewed for the study believed no changes were necessary.[125] While a majority of attorneys believed that the Federal Rules should be changed to address electronic discovery, almost half of the participants expressed that the "problems" that arise in electronic discovery are not unique to electronic discovery.[126]

In September 2002, Professor Marcus, on behalf of the Discovery Subcommittee, sent a letter and accompanying memoranda to about 250 "E-discovery Enthusiasts" inviting commentary on possible Federal Rule changes that would address special features of the discovery of electronic information.[127] In general, the responses reflected allegiance to either plaintiff or defendant organizations:

> Thus, organizations associated with the plaintiff side (the Assoc. of Trial Lawyers of America, the National Assoc. of Consumer Advocates, the Trial Lawyers for Public Justice, and the San Francisco Trial Lawyers Assoc.) urged that rule changes were not warranted. Organizations associated with the defense side (the Defense Research Institute and Lawyers for Civil Justice) argued that rule changes are needed, and that the developing caselaw [sic] does not provide sufficient guidance. The Federal Bar Assoc., meanwhile urged that more local rules be developed to address these problems.[128]

Arguably, the need for reform of the discovery of electronic information is

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supra note 85, at 2. In March 2004, the Federal Judicial Center released the fourth edition of the Manual for Complex Litigation. The new edition includes a section devoted to "Discovery of Computerized Data." MANUAL FOR COMPLEX LITIGATION, *supra* note 73, § 11.446, at 77. In addition, judicial education may be a means of ameliorating the "problems" that arise with the discovery of electronic information. Marcus, *supra* note 44, at 279.

125. FJC Study, *supra* note 11, at 13.

126. *Id.* The FJC study states:

> The issues or problems most frequently reported by magistrate judges regarding computer-based discovery were the hiring of computer experts by one or more parties; inadvertent disclosure of privileged computer–based information; on-site inspection of a party's computer system by an opposing party; preservation or spoliation of computerized data while a lawsuit is pending; and parties' sharing of the costs of retrieving computerized information.

Id. at 2.

127. Letter to E-discovery Enthusiasts, *supra* note 10, at 1.

128. Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 6.

limited to the defense bar's need to further limit the scope and amount of discovery.

E. Amending the Federal Rules Will Not Create Certainty Because Litigants May Still Choose to File in State Court

Amending the Federal Rules will not necessarily create certainty for attorneys and parties. Because certain Federal Rules are different from their state counterparts, parties will not be able to pattern their behavior after these Federal Rules to immunize themselves from adverse impacts in state courts.[129] It is possible that amending the Federal Rules will send plaintiffs to state court. On the other hand, exercising foresight in amending the Federal Rules may encourage state courts to follow suit by enacting similar rules.[130]

F. It Is Improvident to "Freeze" Technological Development—What Is Reasonable Is Constantly Evolving

It is unwise to amend the Federal Rules to address specific technological developments because the discovery portion of the Federal Rules is based on the dynamic principles of reasonableness and balancing.[131] The Federal Rules

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129. For example, if the Federal Rules are amended to protect against inadvertent disclosure of privileged materials, a party may still be vulnerable to a claim of waiver in a state court. Similarly, a party may follow a Federal Rule directive to preserve only its "accessible" information and later find that it has failed to preserve evidence required in a state court action.

130. *Cf.* Advisory Committee Memo, May 2004, *supra* note 1, at 20 (discussing the local rules adopted by several U.S. District Courts and noting that "[a]doption of differing local rules by [U.S. District Courts] may freeze disuniform practices in place and frustrate the ability to achieve national consistency in an area that should be covered by the uniformity the Civil Rules were meant to achieve").

131. *See* FED. R. CIV. P. 26(b)(2); MANUAL FOR COMPLEX LITIGATION, *supra* note 73, § 11.433, at 69. Section 11.433 states:

> But Federal Rule of Civil Procedure 26(b)(2) directs the judge to take into account the cost of particular discovery in exercising the authority to control discovery. Among other things to consider are whether the information sought "is obtainable from some other source that is more convenient, less burdensome, or less expensive," and whether to limit discovery if, in the circumstances of the case, the discovery's "expense . . . outweighs its likely benefits." Protective orders are a means of implementing the proportionality principle underlying the discovery rules.

Id. The Sedona Conference Working Group stated:

> In drafting the principles and commentary, we tried to keep in mind the "rule of reasonableness." That rule, embodied in Rules 1 (courts should secure the just, speedy and inexpensive determination of all matters) and 26(b)(2) (proportionality test of burden, cost and need) of the Federal Rules of Civil Procedure, and in many of their state counterparts, stands for the basic proposition that courts and litigants must permit that discovery that is reasonable and appropriate to the dispute at hand.

Sedona Principles 2003, *supra* note 14, at 1.

require a case-by-case approach that determines the reasonable scope of discovery and is based on flexible concepts that accommodate technological change. Therefore, it is improvident to legislate hard and fast rules regarding discovery of electronic information.

The capacity to handle and manipulate electronic information is constantly improving, resulting in increased efficiency.[132] This makes the search of millions of documents more reasonable. Technological developments continuously expand the scope of what is reasonable—and therefore discoverable. As technology advances and processes improve,[133] bigger projects can be completed, the impossible becomes possible, costs go down, parties want and expect more to be done, and courts expand their views of what is reasonable.[134]

VI. THE ADVISORY COMMITTEE'S PROPOSED AMENDMENTS

There are six areas under serious consideration for reform: (1) expanding the Rule 26(f) discovery-planning session to mandate consideration of electronic discovery and encouraging or requiring the court to address the issue in its scheduling order;[135] (2) revising the definition of "documents" to provide for the various types of electronic information that can be sought through discovery;[136] (3) establishing that the producing party need not produce data that is "not reasonably accessible," absent good cause;[137]

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132. *See* Marcus, *supra* note 44, at 260-61; FJC Study, *supra* note 11, at 8-9.

133. *See* Bennett & Niccum, *supra* note 99, at 610 (describing increased efficiency and effectiveness of new search techniques and new search technologies).

134. Gordon Moore, one of the founders of Intel, originated the idea that the rate of computer processes (chip performance) would double every eighteen months. This concept later came to be known as Moore's Law. Mark G. Milone, *Hacktivism: Securing the National Infrastructure*, COMPUTER & INTERNET LAW., March 2003, at 11 n.6.

135. Advisory Committee Memo, May 2004, *supra* note 1, at 23-24, 26-29, 31-33; Advisory Committee Recommendations, *supra* note 1, at 6-10; Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 6, 8-9; Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 8-14; *see* Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 9-10, 12.

136. Advisory Committee Memo, May 2004, *supra* note 1, at 37-39; Advisory Committee Recommendations, *supra* note 1, at 14-17; Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 6, 10-11; Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 16-18; Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 4-6, 13-15; *see* Notes on Discovery Subcommittee Meeting, *supra* note 19, at 2-5. The proposed changes to Rule 26 regarding the definition and scope of electronically stored data were not part of the Discovery Subcommittee's original focus, "but [the subject] emerged from the drafting process as an important [area]." Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 4.

137. Advisory Committee Memo, May 2004, *supra* note 1, at 45-48; Advisory Committee Recommendations, *supra* note 1, at 10-12; Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 38-39, 43-44; Notes on Discovery Subcommittee Meeting, *supra* note 19, at 2-5; *see* Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 11, 13-14; Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 5-6, 14-15.

(4) amending Rule 34(b) to provide that a party (a) may produce electronically stored data in the form in which it is ordinarily stored, (b) need only produce the data in one form, unless a court orders otherwise for good cause, and (c) may produce electronically stored data in response to an interrogatory;[138] (5) revising Rule 26(b) to protect against inadvertent privilege waiver;[139] and (6) revising Rule 37 to create a "safe harbor" from sanctions for destruction of responsive information through "routine operation of the party's electronic information system."[140]

In its recommendations to the Advisory Committee, the Discovery Subcommittee made clear that "there was no commitment to recommend any change in the rules."[141] The Subcommittee noted that "[s]trong arguments have been made that the present rules are adequate to the job, and the question [of] whether specific amendments would work improvements was one that could only be addressed effectively at a later date."[142] Yet the Advisory Committee has now proposed specific language to amend the Federal Rules relating to discovery and has also invited commentary.

A. Expanding the Initial Discovery-Planning Session to Include Consideration of Electronic Information

1. The Federal Rules Require the Parties to Meet and Confer Regarding a Discovery Plan

Rule 26(f) currently requires the parties, "as soon as practicable" and before a pretrial scheduling order is issued, to meet and confer regarding the initial "disclosures required by Rule 26(a)(1), and to develop a proposed

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138. Advisory Committee Memo, May 2004, *supra* note 1, at 40-43; Advisory Committee Recommendations, *supra* note 1, at 16; Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 21-24; *see* Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 6, 11-12. Alan Blakley observed:

> On the other hand, document production under the rules for paper discovery may occur in conformity with the business' record keeping practices. Requesters often had to rearrange paper if they wanted a different format—presumably at their own cost. So this rule may simply be an outgrowth of the traditional paper rule.

Alan Blakley, *Differences and Similarities in Civil Discovery of Electronic and Paper Information*, 49 FED. LAW. 32, 33 (2002).

139. Advisory Committee Memo, May 2004, *supra* note 1, at 49-51; Advisory Committee Recommendations, *supra* note 1, at 12-14; Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 49-53; *see* Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 6, 14-16.

140. Advisory Committee Memo, May 2004, *supra* note 1, at 52-58; Advisory Committee Recommendations, *supra* note 1, at 17-20; Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 33; *see* Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 6, 16.

141. Notes on Discovery Subcommittee Meeting, *supra* note 19, at 1.

142. *Id.*

discovery plan."[143] Similarly, Rule 16 requires the court to issue an early scheduling order that sets a deadline for discovery and may address "the extent of discovery to be permitted" and "any other matters appropriate in the circumstances of the case."[144]

2. The Advisory Committee's Proposed Amendments

The Advisory Committee has proposed language that would amend Rules 26(f) and 16(b) to require the parties and the court to consider, at this early stage of the action, whether the case will involve disclosure or discovery of electronic information.[145] If so, the parties and the court must consider (1) what procedures would "facilitate" such discovery and (2) whether they should adopt special procedures to protect against the inadvertent disclosure or production of a privileged document.[146]

The proposed language for Rule 26(f) is as follows:[147]

> **(f) Conference of Parties; Planning for Discovery.** . . . [T]he parties must . . . 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: . . .
>
> . . . .
>
> (3) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced;
>
> (4) whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information.[148]

The language being considered for Rule 16(b) is as follows: "The scheduling order may also include . . . (5) provisions for disclosure or discovery of electronically stored information; (6) adoption of the parties' agreement for protection against waiving privilege. . . ."[149]

The Discovery Subcommittee noted the "widespread agreement that thoughtful attention at this early point to the likely needs of discovery of

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143. FED. R. CIV. P. 26(f).

144. FED. R. CIV. P. 16(b).

145. *See* Advisory Committee Memo, May 2004, *supra* note 1, at 22-34; PROPOSED AMENDMENTS, *supra* note 1, at 1-4. The proposed amendments also include an amendment to Form 35. *Id.*

146. PROPOSED AMENDMENTS, *supra* note 1, at 3-4.

147. The Advisory Committee's proposed changes to Rule 26(f) and Rule 16(b) are indicated by underlined text.

148. PROPOSED AMENDMENTS, *supra* note 1, at 8-9

149. *Id.* at 1-2.

digital information can reduce or eliminate a number of problems that might otherwise arise later" and that it was "preferable to have the parties themselves devise solutions to these other problems—the form of production, retention and preservation of digital material, and privilege waiver—rather than prescribing solutions in the rules themselves."[150] Such an amendment seemed like a "'no-brainer'" to the Discovery Subcommittee.[151] In fact, four district courts have already adopted local civil rules that require the parties to consider a similar, but more extensive, range of electronic discovery issues.[152] For example, the local civil rules for the Eastern District of Arkansas require the parties to meet and confer regarding the following issues:

> (a) whether disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business; (b) the anticipated scope, cost and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business; (c) the format and media agreed to by the parties for the production of such Data as well as agreed procedures for such production; (d) whether reasonable measures have been taken to preserve potentially discoverable data from alteration or destruction in the ordinary course of business or otherwise; [and] (e) other problems which the parties anticipate may arise in connection with electronic or computer-based discovery.[153]

The District of New Jersey has adopted similar, but significantly more demanding, revisions to its local civil rules.[154]

One drawback to amending Rule 26(f) and Rule 16(b) is that "mandatory discussion of [electronic discovery issues] might cause undesirable complications in cases in which it is not needed."[155] The amendments to these rules would require the parties to educate themselves about electronic discovery issues and to make decisions about electronic discovery very early in the case. In some cases parties may needlessly waste time and money

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150. Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 8; *see also* Advisory Committee Memo, May 2004, *supra* note 1, at 27 (explaining that "addressing the issues at the outset should often avoid problems that might otherwise arise later in the litigation, when they are more difficult to resolve").

151. Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 8. Professor Marcus has stated that this "sort of amendment to Rule 26(f) to promote early consideration of e-discovery issues seems likely to be widely acceptable." Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 9.

152. *See* E.D. ARK. L. CIV. R. 26.1(4); W.D. ARK. L. CIV. R. 26.1(4); D.N.J. L. CIV. R. 26.1(b)(2)(d); D. WYO. L. CIV. R. 26.1(d)(3). The U.S. District Court for the District of Kansas has set forth Electronic Discovery Guidelines to instruct attorneys on discovery of electronic information. D. Kan. Electronic Discovery Guidelines 4(a)-(g) *available at* http://www.ksd.uscourts.gov/attorneys/electronicdiscoveryguidelines.pdf (last visited Nov. 19, 2004).

153. E.D. ARK. L. CIV. R. 26.1(4).

154. *See* D.N.J. L. CIV. R. 26.1(b)(2)(d).

155. Marcus Rule Changes Memo, Sept. 2002, *supra* note 85, at 3.

fulfilling the rules' requirements. For example, this wastefulness may come about when a court has not considered a meritorious and dispositive motion under Rule 12(b).[156]

3. The Standing Committee Should Recommend Amending the Federal Rules to Require the Parties to Meet and Confer Regarding Electronic Discovery Issues

The Standing Committee should recommend amending Rule 26(f) to require the parties to meet and confer regarding electronic discovery issues. On balance, this amendment will facilitate discovery and help to minimize expenses. Although it will require the parties to consider electronic discovery issues, it is sufficiently "open-ended" and general that it leaves room for technological growth. This amendment also recognizes that discovery of electronic information requires the parties and the court to address new issues as well as old issues that appear in intensified form. It does not conflict with any of the other Federal Rules and it does not conflict with, or even require consideration of, case law on electronic discovery issues or issues relating to privilege and waiver of privilege. The amendment will make litigants more proactive in addressing the scope of discovery and potential discovery issues and will minimize the need for micromanagement of electronic discovery issues by the courts. Finally, it will accelerate the learning curve for courts and litigants so that they will develop effective and inexpensive methods of dealing with the discovery of electronic information.[157]

The Standing Committee should not recommend, however, adopting the language proposed by the Advisory Committee. The Advisory Committee's proposal includes a new term: "electronically stored information."[158] As discussed below, this term is unnecessary and too restrictive.[159] Why limit the meet and confer requirement to discussions of "electronically stored information" when there are significant cost and logistical concerns with producing "data compilations" of all types? A better proposal would utilize

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156. The Discovery Subcommittee rejected a similar amendment to Rule 26(a)(1) because it would needlessly increase costs. The proposed amendment to Rule 26(a)(1) would have expanded the initial disclosure obligations "to include some information about a party's electronic storage of data." Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 6, 9-10. The Discovery Subcommittee explained that this amendment would "encourage more precise discovery requests for digital information" and "forc[e] parties to think about what electronic material the[y] possess early in the litigation." *Id.* at 9. At a subsequent meeting, the Subcommittee concluded that "the consensus was [that] it would be an unnecessary burden to require disclosure regarding computer systems in all cases, and that a Rule 26(f) provision would suffice. Accordingly, no initial disclosure proposal would be presented to the full Committee." Notes on Discovery Subcommittee Meeting, *supra* note 19, at 20.

157. *See* Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 9.

158. Advisory Committee Memo, May 2004, *supra* note 1, at 38.

159. *See infra* Section VI.B.3.

the existing phrase, "data compilations," either alone or in conjunction with a modifier. For example, a better phrase would be "discovery of data compilations, including electronically stored information."

Additionally, the Standing Committee should not recommend amending Rule 26(f) to state "whether, upon agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information."[160] Nor should the Standing Committee recommend amending Rule 16(b) to provide that the scheduling order "may adopt[] . . . the parties' agreement for protection against waiving privilege."[161] This issue of privilege waiver is one of several specific issues that the parties might consider in their general discussion of electronic information issues.[162] The Discovery Subcommittee considered whether to include more specific provisions, patterned after the local rules of district courts discussed above but declined to do so.[163] It determined, for example, that a specific provision to discuss cost-bearing would "sen[d] an inappropriate message."[164] The language regarding privilege waiver should be rejected for the same reason. By including this provision in the Federal Rules, it implies that the courts have the power to craft orders that limit privilege waiver. This is an issue governed by the Rules of Evidence, which have not been amended on this issue.[165] Furthermore, this provision would invite the various district courts to adopt blanket rules regarding privilege waiver. This might produce the unintended effect of creating a myriad of different standing orders relating to privilege waiver.

If the Discovery Subcommittee wishes to include a list of potential specific issues for the parties to consider, it should include them in the Committee Notes. This would alert parties to likely issues while allowing the parties to tailor their discussions to the issues that are relevant to their dispute.

B. Revising the Current Definition of "Documents"

1. The Current Definition of "Documents" in the Federal Rules

Rule 34 currently refers to "data compilations from which information can be obtained," and Rule 26(a)(1)(B) refers to "data compilations."[166] The Federal Rules and the accompanying Advisory Committee Notes make clear

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160. PROPOSED AMENDMENTS, *supra* note 1, at 9.

161. *Id.* at 2.

162. Rule 26.1 for the U.S. District Courts for the Eastern and Western Districts of Arkansas sets forth specific issues that the parties must consider. E.D. ARK. L. CIV. R. 26.1(4); W.D. ARK. L. R. 26.1(4); *see supra* text accompanying note 153.

163. Notes on Discovery Subcommittee Meeting, *supra* note 19, at 20-21.

164. *Id.* at 21.

165. There is a significant question as to whether such an order would even be effective. *See infra* text accompanying note 248.

166. FED. R. CIV. P. 34(a); FED. R. CIV. P. 26(a)(1)(B).

that electronic information of all types is presumptively discoverable.[167] Furthermore, the Federal Rules apply to discovery of electronic information and "[e]lectronic documents are no less subject to disclosure than paper records."[168]

2. The Advisory Committee's Proposed New Definition of "Documents"

The Discovery Subcommittee has circulated language that would amend Rule 34 to further define "documents" and data compilations in particular.[169] The proposed language is intended to define documents and data compilations to include "all presently known and future forms of storage."[170] The proposed language for Rule 34 is as follows:[171]

> **(a) Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test, or sample any designated electronically stored information or any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, images . . . and any

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167. FED. R. CIV. P. 34(a) (noting that documents include "writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form"); FED. R. CIV. P. 26(a)(1)(B) (including "data compilations" within the initial disclosures a party must make to other parties); *Id.* at advisory committee's note on 1993 amendment (explaining that "the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information"). The Advisory Committee's Notes to the 1970 amendment to Rule 34 provide:

> The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronics [sic] data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data.

FED. R. CIV. P. 34 advisory committee's note on 1970 amendment.

168. Rowe Entm't, Inc. v. William Morris Agency, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) (collecting cases).

169. The Discovery Subcommittee determined that there were "two basic issues: (1) how to provide a description that would encompass all presently known and future forms of storage of information, and (2) whether the definition of a document should include what has become known as 'metadata' and 'embedded data.'" Notes on Discovery Subcommittee Meeting, *supra* note 19, at 2. See *infra* Section VI.C.3 for discussion of the second issue.

170. Advisory Committee Memo, May 2004, *supra* note 1, at 38 ("The rule covers information stored 'in any medium,' to encompass future developments in computer technology."); Notes on Discovery Subcommittee Meeting, *supra* note 19, at 2.

171. The Advisory Committee's proposed changes to Rule 34 are indicated by underlined text.

> other data or data compilations in any medium—from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect, ~~and~~ copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served . . . .[172]

The Advisory Committee also revised the title of Rule 34: "Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes."[173]

3. The Standing Committee Should Recommend Against Revising the Definition of "Documents"

The Advisory Committee's proposal to revise the definition of "documents" to encompass all known and future forms of information storage is a step backward.[174] Rule 34 currently refers to "data compilations from which information can be obtained."[175] This is a broad, flexible phrase that encompasses electronic, magnetic, and other types of information, and it is universally accepted that electronic information of all types is presumptively discoverable.[176] The Advisory Committee Notes to the 1970 amendment to Rule 34 explicitly state that the "inclusive description of 'documents' is revised to accord with changing technology."[177] In fact, the current Advisory Committee's "Committee Note" states that "[t]he reference to 'data or data compilations' includes any databases currently in use or developed in the future."[178] An attempt to further refine the definition of "documents" to encompass all possible forms of information storage is unnecessary.

Instead, the proposed language would diminish the flexibility of the Federal Rules. The phrase "electronically stored information" is less inclusive

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172. PROPOSED AMENDMENTS, *supra* note 1, at 24-25.

173. *Id.* at 24.

174. The Discovery Subcommittee acknowledged the necessity of devising a "definition that will stand the test of time." Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 5 & n.1. In particular, the Discovery Subcommittee noted the statutory definitions of "electronic" and "electronic record" in other contexts. *Id.* at 5 n.1. For example, under the Electronic Signatures in Global and National Commerce Act, "'electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities" and "'electronic record' means a contract or other record created, generated, sent, communicated, received, or stored by electronic means." 15 U.S.C. § 7006 (2000).

175. FED. R. CIV. P. 34(a).

176. *See supra* Section VI.B.1. *But cf.* Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 10 (asserting the Discovery Subcommittee's goal to revise the Federal Rules to include a "modern and accurate definition of the various types of digital data that can be sought through discovery").

177. FED. R. CIV. P. 34 advisory committee's notes on 1970 amendment.

178. Advisory Committee Memo, May 2004, *supra* note 1, at 38.

and expressive than the phrase "data compilations."

> The goal of this effort is to try to use terms that anticipate technological developments and would be sufficiently flexible to be of use once these occur. Thus, it is hoped that, if current consideration of chemical or biological computing actually leads to innovative techniques, those new techniques would be encompassed within the terms used here.[179]

The existing language, "data compilations from which information can be obtained," already encompasses biological and chemical information storage processes.[180] By contrast, the language proposed by the Advisory Committee does not appear to encompass these new technologies. In fact, the proposed amendment requires the addition of a new modifier to the phrase "data compilations," which becomes "data compilations in any medium" to compensate for the limiting nature of the phrase "electronically stored information." The proposed definitional language is at once ineffective, redundant, and unnecessary. Additionally, Professor Marcus has noted that "definitions in the rules are [generally] not favored."[181] Furthermore, the changes to the title of Rule 34 add to the impression that "Electronically Stored Information" is a separate category, not included within the universe of "documents." The Standing Committee, therefore, should recommend against amending the Federal Rules to revise the definition of "documents."

C. Establishing That "Not Reasonably Accessible" Electronic Data Is Discoverable Only upon a Showing of Good Cause

One of the most frequently discussed topics relating to discovery of electronic information is the increased time and expense necessary to locate, retrieve, review, and produce all of the potentially discoverable information. Under the current Federal Rules, a party may object to the burden and cost of discovery pursuant to subsections (b) and of (c) Rule 26, but the Rules fail to set forth specific categories of information that are not discoverable.[182] The Advisory Committee has proposed language that would provide that electronically stored information that is "not reasonably accessible" is discoverable only upon a showing of good cause.[183]

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179. Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 5-6.

180. FED. R. CIV. P. 34 (providing that "designated documents . . . includ[e] writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form"); *see supra* note 167.

181. *See* Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 6.

182. *See* FED. R. CIV. P. 26(b)-(c).

183. PROPOSED AMENDMENTS, *supra* note 1, at 6.

1. The Current Treatment of "Not Reasonably Accessible" Data in the Federal Rules

a. The Proportionality Test

Requiring the court to take an active role in managing a case, which includes balancing the costs and benefits of discovery, is an essential part of the framework of the Federal Rules. Rule 1 provides that the Federal Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[184] In fact, Rule 1 was amended in 1993 to emphasize the affirmative obligation of the courts to consider costs.[185] According to the Advisory Committee's Notes to the 1993 amendment, "[t]he purpose of this revision, adding the words 'and administered' to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay."[186]

Rule 26(b) establishes a proportionality test whereby a party may object if the burden and expense of discovery or disclosure of the requested information outweighs its likely benefit.[187] Specifically, Rule 26(b)(2) provides:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in

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184. FED. R. CIV. P. 1.

185. *Id.* at advisory committee's note on 1993 amendment.

186. *Id.* The explicit consideration of costs has been referred to as a "'rule of reasonableness'" that "stands for the basic proposition that courts and litigants permit discovery that is reasonable and appropriate to the dispute at hand." *Sedona Principles* 2004, *supra* note 15, at iii; *see also* Herbert v. Lando, 441 U.S. 153, 177 (1979) (noting that "the discovery provisions . . . are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action'" (quoting FED. R. CIV. P. 1)).

187. FED. R. CIV. P. 26(b)(2). One must remember, of course, that the proportionality test is applied only after the information is determined to be relevant. Authors Carroll and Withers cautioned:

> By concentrating on the balancing factors found in Rule 26(b)(2), however important they may be, we risk glossing over the fact that there is another side to the balance, a factor which needs to be considered before one reaches Rule 26(b)(2)—the relevance of the proposed discovery to the claims and defenses of the parties or the subject matter of the dispute. Discovery is driven by relevance, modified in appropriate cases by logistical and cost concerns, not the other way around.

Carroll & Withers, *supra* note 111, at 3.

resolving the issues.[188]

Thus, the district court may determine that electronic information that is very difficult and expensive to obtain in a usable form is not discoverable.[189] In fact, Rule 26(b)(1) was amended in 2000 to reiterate that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)."[190] The Advisory Committee Notes to the 2000 amendment acknowledge that this language is redundant, but indicate that it is intended to emphasize the court's affirmative obligation to consider and limit the scope of discovery on a case-by-case basis.[191]

Given the existing procedures for challenging discovery of information that is "not reasonably accessible" and the recent amendments that emphasize the need for an active judicial role in limiting the scope of discovery, one must question whether additional amendments are necessary or appropriate. It is possible that the Advisory Committee is concerned because the Federal Rules require active judicial management and a case-by-case analysis of the appropriate scope of discovery.[192] The proposed revisions, however, will not

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188. FED. R. CIV. P. 26(b)(2). The Advisory Committee Notes to the 1983 amendments state:

> The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

Id. at advisory committee's note on 1983 amendment.

189. "Protective orders are a means of implementing the proportionality principle underlying the discovery rules." MANUAL FOR COMPLEX LITIGATION, *supra* note 73, § 11.433, at 69.

190. FED. R. CIV. P. 26(b)(1).

191. The Advisory Committee Notes to the 2000 amendments to Rule 26 state:

> Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.

Id. at advisory committee's note on 2000 amendments (citation omitted). One recent article stated that the 2000 amendments to Rule 26 "continued a lengthy pendulum swing toward narrower initial disclosure, with more judicial intervention." Robert E. Allen et al., *Federal Discovery Under the 2000 Amendments to Rule 26*, 3 SEDONA CONF. J. 211, 212 (2002).

192. Noting how traditional and electronic discovery create dissimilar "difficulties for the

resolve that issue. Even if electronic information is discoverable, a district court also has discretion under Rule 26(c) to grant orders protecting the responding party from "undue burden or expense" in complying with discovery requests. Such protection may include orders "that the disclosure or discovery may be had only on specified terms and conditions"[193] and "orders conditioning discovery on the requesting party's payment of the costs of discovery."[194] Much of the case law and commentary regarding electronic discovery has focused on the possibility of cost-shifting.

b. Case Law Regarding Application of the Cost-Shifting Analysis

A recent survey of case law concluded that there is an "emerging majority position that places a fairly heavy burden of persuasion on the party seeking to shift the costs of electronic discovery."[195] Courts generally deny cost-shifting motions because "the Rules fail to provide any meaningful guidance

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adjudicatory system," Professor Redish commented:

> Thus, the only means by which one could conclude that electronic discovery does not deserve special treatment in the rules of civil procedure would be to commit to the virtually unlimited case-by-case judicial discretion dictated by the "managerial model." This model suffers from many problems, however. Because the model gives judges vast freedom in individual cases, it effectively places society in a policy straightjacket that prevents it from deciding how best to manage discovery problems. Since judges are permitted to fashion solutions to discovery problems in individual cases largely free from categorical direction on the basis of a priori policy choices, society is deprived of the opportunity to make such choices among competing values. This is a cost that on a number of occasions the rules' drafters have been unwilling to bear, and they therefore have chosen to send trial judges particular substantive messages about how value choices are to be made. Another problem with the managerial model is that a commitment to unguided case-by-case discretion lessens predictability for litigants, who therefore may be hampered significantly in their efforts to plan their primary behavior.

Redish, *supra* note 24, at 566-67.

193. FED. R. CIV. P. 26(c)(2).

194. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

195. Scheindlin & Rabkin, *supra* note 4, at 356-61; *see Oppenheimer Fund*, 437 U.S. at 364 (requiring plaintiffs to bear costs of searching electronic evidence to identify class members); Sattar v. Motorola, Inc., 138 F.3d 1164, 1171 (7th Cir. 1998) (affirming district court's order requiring defendant (1) to provide plaintiff with electronic devices and software necessary to read 210,000 pages of e-mail contained on tapes that had been produced or (2) to pay half the cost of printing and producing the e-mails in hard copy); *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1995 WL 360526, at *1-3 (N.D. Ill. June 15, 1995) (requiring plaintiff and defendant to share the cost of retrieving defendant's e-mail data tapes); Daewoo Elecs. Co. v. United States, 650 F. Supp. 1003, 1007 (Ct. Int'l Trade 1986) (ordering the Department of Commerce to provide other party with "all computerized . . . data sets used" in the challenged administrative review); Bills v. Kennecott Corp., 108 F.R.D. 459, 464 (D. Utah 1985) (requiring defendant to bear burden of printing out hard copy of electronic materials).

to the court in exercising this discretion and, in any event, pay no attention to the arguably special needs of electronic discovery."[196] In short, courts make the responding party bear the costs of discovery because that is the way it has always been done.

c. The *Zubulake* Cost-Shifting Analysis

In *Zubulake v. UBS Warburg LLC*,[197] the Southern District of New York set forth the factors to consider when deciding a request to shift the costs of electronic discovery.[198] In *Zubulake I*, the plaintiff sued her former employer for gender discrimination and illegal retaliation.[199] She sought discovery of e-mails exchanged among the defendants' employees that existed, if at all, only on backup tapes and "other archived media."[200] Based on defendants' affidavits, the court estimated that it would cost defendants approximately $175,000 (not including attorney time) to restore those tapes.[201] Defendants made backup tapes—essentially a "snapshot" of all e-mails that existed on the server at the moment the backup was performed—at three separate intervals: nightly, weekly, and monthly.[202] "Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years. After the relevant time period elapsed, the tapes were recycled."[203] Defendants also stored certain e-mails on optical disks, which, in contrast to the backup tapes, were easily searchable.[204] The defendants objected to producing the information, particularly the e-mails, contained on the backup tapes and the

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196. Redish, *supra* note 24, at 578-79; *see also* Allman, *supra* note 43, at 207 ("[C]ourts are directed by Rule 26(b)(2) to balance the likely benefit against the burden or expense to the producing party on a case-by-case basis."); Scheindlin & Rabkin, *supra* note 4, at 369 ("Judges are left to determine cost-shifting motions on a fact-intensive basis by drawing on the often-ignored 'proportionality' provisions of Rule 26(b)(2).").

> [W]hile courts have managed to resolve motions that raise Rule 34 questions in the context of electronic discovery, they have generally approached these questions in a highly fact-specific manner, producing few general principles to aid in the resolution of similar disputes. The courts are left to develop procedural standards regarding electronic discovery under Rule 34 in the absence of express guidance from the Rules themselves. To date, however, little consensus has developed as to what these principles should be.

Id. at 361.

197. 217 F.R.D. 309 (S.D.N.Y 2003).

198. *Id.* at 322. The decisions discussed in this Section are Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) (Zubulake I) and Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) (Zubulake III). The *Zubulake* decisions were written by Judge Shira Scheindlin, who is also a member of the Rules Advisory Committee.

199. *Zubulake I*, 217 F.R.D. at 311.

200. *Id.* at 312.

201. *Id.*

202. *Id.* at 314.

203. *Id.*

204. *Id.* at 314-15.

optical disks.

The court held that the optical disks and backup tapes were discoverable even though they contained information that was "deleted" from the defendants' computers.[205] The court wrote that it is an "accepted principle" that "electronic evidence is no less discoverable than paper evidence"[206] and that the "Supreme Court has instructed that 'the presumption is that the responding party must bear the expense of complying with discovery requests.'"[207] The court asserted that "[a]ny principled approach to electronic evidence must respect this presumption."[208]

The court then addressed the defendants' request to shift costs and held that "[f]or data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes."[209] The court also set forth the seven factors that it would apply in the cost-shifting analysis:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.[210]

The *Zubulake I* analysis further provides that these seven factors should not be weighed evenly but are presented in descending order of importance.[211] "The first two factors—comprising the marginal utility test—are the most important" and the last factor is the least important.[212] Finally, the court held that a factual basis, rather than reliance on assumptions "concerning the likelihood that relevant information will be found," is required to support the analysis.[213]

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205. *Id.* at 317 & n.38.

206. *Id.* at 317.

207. *Id.* at 317 (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)).

208. *Id.*

209. *Id.* at 324.

210. *Id.* at 322. The seven-factor analysis is a modification of a similar eight-factor cost-shifting test set forth in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

211. *Zubulake I*, 217 F.R.D. at 323.

212. *Id.*

213. *Id.* at 323-24.

In *Zubulake III*, Judge Scheindlin reviewed the parties' evidence regarding the costs to retrieve and restore the remaining backup tapes.[214] The defendants requested that the court shift two sets of costs to the plaintiff: (1) the cost for the outside consultants to restore and search the tapes ($165,954.67) and (2) the costs for attorneys and paralegals to review the documents ($107,694.72).[215] The court noted that "the responding party has the burden of proof on a motion for cost-shifting."[216] The court then applied its seven-factor test and determined that the plaintiff should bear twenty-five percent of the cost to search and restore the backup tapes.[217] The court further determined that the defendants should bear the entire cost of reviewing the documents for privilege and producing them.[218]

The *Zubulake* cost-shifting analysis is based on the distinction between "accessible" and "inaccessible" information.[219] Although both types of information are considered discoverable, a court will consider shifting costs to the requesting party only if the information is inaccessible.[220] The analysis of whether information is "accessible" appears to be a case-by-case determination based on the facts, not assumptions, of each particular case.[221] According to the court in *Zubulake I*, "[a]s long as the data is accessible, it must be produced."[222] Thus, the same type of information stored the same way may be "accessible" for one party and "inaccessible" for another party. Information often will be more accessible—and therefore more discoverable—when held by a large, sophisticated corporation than when it is held by an individual.

The focus of this Article is not to assess the relative merits of utilizing the

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214. Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) (Zubulake III). Following the order in *Zubulake I*, the defendants determined that there were only seventy-five, not ninety-four, responsive backup tapes. *Id.* at 282.

215. *Id.* at 283.

216. *Id.*

217. *Id.* at 291.

218. *Id.*

219. *Zubulake I*, 217 F.R.D. at 321-22.

220. *Id.* at 324.

221. *Id.* at 323-24.

222. *Id.* at 322. The court in *Zubulake I* noted,

> Whether the data is kept for a business purpose or for disaster recovery does not affect its *accessibility*, which is the practical basis for calculating the cost of production. Although a business purpose will often coincide with accessibility—data that is inaccessible is unlikely to be used or needed in the ordinary course of business—the concepts are not coterminous. In particular, a good deal of accessible data may be retained, though not in the ordinary course of business. For example, data that should rightly have been erased pursuant to a document retention/destruction policy may be inadvertently retained. If so, the fact that it should have been erased in no way shields that data from discovery. As long as the data is accessible, it must be produced.

Id. at 321-22 (footnote omitted).

seven-factor *Zubulake* analysis to consider a request to shift costs. I will note, however, that the court's decision in *Zubulake I* appears to depart from the framework of the current Federal Rules by improperly conflating the analysis of whether the information at issue is discoverable with the analysis of whether the responding party must bear the costs of producing the information. By conflating the two issues, the *Zubulake* decisions suggest that the proportionality test set forth in Rule 26(b)(2)[223] is actually a cost-shifting analysis. This is a significant departure from the language and structure of the Federal Rules.

The Rule 26(b)(2) proportionality test is applied to determine whether the information at issue is relevant and discoverable. "Rule 26(b)(2)(iii) allows the court to limit or modify the extent of otherwise allowable discovery if the burdens outweighs the likely benefit—the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems."[224] After applying the Rule 26(b)(2) proportionality test and determining that the information is discoverable, the court can consider any requests to shift the costs of production. Thus, "accessible" information, such as e-mails stored on optical disks like those in *Zubulake*, will not be discoverable if the burden and expense of such discovery outweigh its likely benefits.[225] Although there will be some scenarios in which accessible information will not be discoverable, there also will be scenarios in which accessible information is so minimally "discoverable" that the court should shift the costs of such discovery. This is contrary to the *Zubulake III* court's pronouncement that "cost-shifting is potentially appropriate only when *inaccessible* data is sought."[226]

It also raises the issue of whether a court should employ separate tests (or different factors for the same analysis) when it considers (a) whether to permit discovery and (b) whether to shift the costs of discovery. For example, the *Zubulake III* court held that "the responding party should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form."[227] In *Zubulake III*, "the estimated cost of *restoring and*

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223. The proportionality test considers whether "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." FED. R. CIV. P. 26(b)(2).

224. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 73, § 11.446, at 79.

225. *Cf. Zubulake I*, 217 F.R.D. at 324 ("For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes.").

226. Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (Zubulake III).

227. *Id.* at 290. As support for this conclusion, the court reasoned that "the producing party has the exclusive ability to control the cost of reviewing the documents" because, among other things, it can "enter into so-called 'claw-back' agreements that allow the parties to forego

searching the remaining backup tapes [performed by the outside consultants was] $165,954.67, while the estimated cost of *producing* them (restoration and searching costs plus [defendants'] attorney and paralegal costs) [was] $273,649.39 . . . a difference of $107,694.72."[228] Thus, the *Zubulake* court's seven-factor analysis does not permit consideration of defendant's internal costs and defendant's attorney and paralegal costs.[229] The only factor relevant to the *Zubulake* analysis is the cost to locate and translate the information. This proscription does not appear in Rule 26(b)(2) or anywhere else in the Federal Rules. It also runs counter to the dictates of Rule 1, which provide that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[230]

The total cost, including attorneys' fees, to all participants—the responding party, the requesting party, the court and other affected third parties—is exactly the type of factor that the court should consider when determining whether the requested information is discoverable pursuant to Rule 26(b)(1) and (2). Judge Scheindlin captured the analysis when she and Jeffrey Rabkin wrote:

> There are no special rules governing discovery of electronic information; rather, it proceeds under the same framework as discovery of any other information under Rule 34. The responding party confronts threshold issues as to whether the requested information is discoverable—within the scope of Rule 26(b)(1) [and 26(b)(2)(i), (ii) and (iii)]—and if so, whether it is privileged. For non-privileged, discoverable information, secondary issues arise as to the way in which the information is produced to the requesting party, including when, where and how the production takes place, and who bears the costs associated with the discovery.[231]

Unfortunately, the *Zubulake* analysis appears to have ignored or disregarded this principle.

2. The Proposed Revisions to Rule 26

The Advisory Committee has circulated language that would amend

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privilege review altogether in favor of an agreement to return inadvertently produced privileged documents." *Id.* at 290. This ignores the fact that the force and validity of "claw-back" agreements is not yet clear and that, in any event, they require the agreement of both parties. *See infra* Section VI.E.1. This issue might be more properly considered as an additional factor in the *Zubulake* cost-shifting analysis: whether the responding party sought to limit costs by proposing a claw-back agreement.

228. *Zubulake III*, 216 F.R.D. at 289-90.

229. Such attorney and paralegal time might include review for privileged and proprietary information.

230. FED. R. CIV. P. 1.

231. Scheindlin & Rabkin, *supra* note 4, at 346.

Rules 26 and 34 to provide that "electronically stored information" that is "not reasonably accessible" is discoverable only upon a showing of good cause.[232] The proposed new language for Rule 26(b)(2) is as follows:[233]

> **(2) Limitations.** . . . A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information sought is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.[234]

The Advisory Committee's Note indicates that whether information is "reasonably accessible" must be determined on a case-by-case basis.[235] As technology evolves, what is reasonable generally expands, creating a separate set of problems.[236]

3. Information That Is Not Reasonably Accessible Should Be Presumptively Not Discoverable

The Advisory Committee should recommend amending the Federal Rules to provide that data that is both (a) "not reasonably accessible" and (b) actually not accessed is presumptively not discoverable. This amendment would minimize the frequency with which litigants must retain outside experts to locate, retrieve, and translate data from their information management systems. Additionally, this amendment would resolve the issue of "legacy data," which is, by definition, not reasonably accessible. Furthermore, this amendment would respond to criticism that the Federal Rules do not adequately limit the time and expense of discovery of electronic information. The amendment would provide flexibility and permit discovery of information which is not currently "accessible" but will be easily "accessible" in the near future. Finally, this amendment is consistent with the framework of the existing Federal Rules, including the proportionality test of Rule 26(b)(2).[237]

The Discovery Subcommittee considered whether to make certain types of data—particularly metadata and embedded data—part of a "second tier" of

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232. PROPOSED AMENDMENTS, *supra* note 1, at 6.

233. The Advisory Committee's proposed changes to Rule 26 are indicated by underlined text.

234. PROPOSED AMENDMENTS, *supra* note 1, at 6.

235. *Id.* at 12. This determination "may depend on a variety of circumstances. One referent would be whether the party itself routinely accesses or uses the information." *Id.*

236. According to the Advisory Committee, "Technological developments may change what is 'reasonably accessible' by removing obstacles to using some electronically stored information. But technological change can also impede access by, for example, changing the systems necessary to retrieve and produce the information." *Id.* at 12-13.

237. FED. R. CIV. P. 26(b)(2).

information that is discoverable only after a showing of good cause. The Discovery Subcommittee engaged in

> extended debate . . . on whether inclusion of metadata and embedded data should be routinely required in initial production of documents. Opposition to a routine requirement was based on the low likelihood that this material—particularly embedded data—will be used, and on the added cost resulting from mandating that it be included.[238]

The Discovery Subcommittee also considered whether the "second-tier" materials should be placed beyond the scope of discovery or disclosure altogether.[239]

Other "first-tier-second-tier" distinctions have been proposed. One proposal distinguishes between those items that are created automatically by a computer program (not discoverable) and those items created "intentionally" by the user (discoverable).[240] This distinction would probably create more disputes than it would resolve. Courts would struggle to answer the question of what is "intentional." For example, if someone sets his or her computer to automatically save everything on the screen every ten minutes, is that

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238. Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 15. The expected increased costs include the responding party's cost to review its metadata and embedded data to ascertain if it contains privileged or proprietary information. For example, assume that a litigant sent a relevant letter to its adversary (or even a third party). Also assume that the letter went through numerous iterations, some of which included review, commentary and changes that were made based on the input of the litigant's attorney. In this circumstance, the metadata and the embedded data would both contain privileged information.

239. Notes on Discovery Subcommittee Meeting, *supra* note 19, at 17.

240. *See Sedona Principles* 2003, *supra* note 14, at 10. The Sedona Conference Working Group set forth fourteen Sedona Principles for Electronic Document Production. According to Sedona Principle No. 12, "Absent specific objection, agreement of the parties or order of the court, electronic documents normally include the information intentionally entered and saved by a computer user." *Id.* One of the members of the Advisory Committee, Judge Shira Ann Scheindlin, and her former clerk, Jeffrey Rabkin, have written an article that proposes amending Rule 34 to define its scope to explicitly include all forms of electronic evidence that are within the respondent's "possession, custody or control." Scheindlin & Rabkin, *supra* note 4, at 371-74. Scheindlin and Rabkin argue, however, that "data compilations" do not include or encompass "[e]mbedded data, [w]eb caches, history, temporary, cookie and backup files—all of which are forms of electronically-stored information automatically created by computer programs rather than computer users." *Id.* at 372. Their proposal would distinguish discovery of "documents" from discovery of other "data." Scheindlin & Rabkin explained:

> This revision would provide a textual basis for developing separate bodies of case law for discovery of "document" and "data." In turn, this would allow courts to acknowledge the special characteristics of electronic evidence when dealing with questions such as privilege, proprietary interests and protective orders, "undue burden" or possession, custody and control.

Id. at 374.

intentional? What if that is the "default" setting and the user was unaware that the information was being saved? If a user types and then deletes a phrase, was the information created intentionally? If the employer is recording each keystroke of an employee, unbeknownst to the employee, is this information being created intentionally?

A second proposal classifies as "second tier" those items that are not reasonably available to the responding party in its ordinary course of business.[241] This proposal allows the responding party to refuse to produce materials that are reasonably accessible, as long as the party does not ordinarily access those materials as part of its business.[242] This proposal also would have a significantly different impact when applied to sophisticated business entities as compared with unsophisticated, individual litigants. A third similar proposal classifies as "second tier" those items that require the responding party to incur "undue burden or expense" regardless of whether the producing party accesses the information for its own purposes.[243]

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241. *See* Redish, *supra* note 24, at 608 (proposing a system of cost-shifting "triggered" by an objection that "(a) all or a significant portion of the response will necessarily include electronically stored data, and (b) that data is not reasonably accessible in the ordinary course of business"); *see also* TEX. R. CIV. P. 196.4 (providing that "[t]he responding party must produce the electronic . . . data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business"). Sedona Principle No. 13 provides:

> Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.

Sedona Principles 2003, *supra* note 14, at 10. The Discovery Subcommittee cautioned that this approach "could raise difficulties should there be a strong reason for investing the effort to unearth items not accessed during the normal course of business." Discovery Subcommittee Report, Apr. 2003, *supra* note 2, at 11.

242. Notes on Discovery Subcommittee Meeting, *supra* note 19, at 17.

243. *See* ABA Discovery Standard 29(b)(iii) (1999) (explaining that the party seeking discovery "generally should bear any special expenses incurred by the responding party in producing requested information"); Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 24-27. Sedona Principles Nos. Eight and Nine state:

> 8. The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval, and resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.
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> 9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review or produce deleted, shadowed, fragmented or residual data or documents.

Ultimately, the Advisory Committee chose to distinguish between electronic information that is "reasonably accessible"—and therefore discoverable—and electronic information that is "not reasonably accessible"—and therefore not discoverable absent a showing of good cause. The proposed rule would "(1) . . . put backup tapes and the like off limits absent a court order, and (2) similarly . . . exclude inaccessible materials from the duty to search absent direction from the court."[244]

The Advisory Committee's use of a flexible definition—"not *reasonably* accessible"—will accommodate technological change and avoids problems inherent in defining specific material as "first tier " or "second tier." For example, the Discovery Subcommittee originally categorized "data from systems created only for disaster-recovery purposes" in Rule 26 and "data that has been deleted and is now available only on backups or through restoration of deleted files by means of retrieving residual data or file fragments" as "second tier data."[245] This is contrary to promoting a flexible standard that can evolve to keep pace with technological changes. By embedding a transient technology in the Rules, this original proposal also ignores the fact that technology is constantly being developed to respond to these issues. Some enterprising commercial concern will likely develop software that makes it possible to quickly and cheaply search, locate, and retrieve information from backup tapes, residual data, or file fragments, including metadata and embedded data.

The Standing Committee, however, should not recommend the language proposed by the Advisory Committee. The Advisory Committee's proposed language is limited to "electronically stored information."[246] By limiting the scope of the amendments, the Advisory Committee has created a distinction without justification. Why should inaccessible hard copy documents be different? According the court in *Zubulake I*, "Examples of inaccessible paper documents could include (a) documents in storage in a difficult to reach place; (b) documents converted to microfiche and not easily readable; or (c) documents kept haphazardly, with no indexing system, in quantities that make page-by-page searches impracticable."[247] The Advisory Committee's proposed language also would exclude biologically-stored or chemically-stored information.

Second, the Advisory Committee's proposal creates an additional defined term—"electronically stored information."[248] As noted above, creation of this new term is unnecessary (data compilations already encompass such

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Sedona Principles 2003, *supra* note 14, at 9.

244. Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 23 n.16.

245. *Id.* at 23-24.

246. PROPOSED AMENDMENTS, *supra* note 1, at 6.

247. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (Zubulake I).

248. PROPOSED AMENDMENTS, *supra* note 1, at 6.

information), disfavored, and unwise (as it will be quickly out of date).[249]

Third, the Advisory Committee's proposed language alters the existing format of the Federal Rules. Under the Advisory Committee's language, it is not clear how and when one applies the proportionality test of Rule 26(b)(2). If the proportionality test is to be applied at the same time and in the same manner as the current rules, then the addition of the proposed language to Rule 26(b)(2) is redundant. For example, must an individual plaintiff produce information that is "reasonably accessible," but costly and of little, if any, relevance? Under the proposed Advisory Committee language the answer is probably "yes." Yet what if the individual plaintiff wants to object on grounds of the proportionality test of Rule 26(b)(2)? When does such an objection occur? Is it resolved before or after the Rule 26(c) inquiry? When is it appropriate to consider objections on the basis of cost? The Advisory Committee's proposed language in Rule 26(b)(2) does not resolve these issues.

Fourth, the Advisory Committee's proposed language does not address the circumstance in which the responding party actually searches for and locates documents—even when they are not "reasonably accessible" and very expensive to obtain. This circumstance is likely to occur in high-stakes litigation where a company has significant resources and the amount in controversy warrants "leaving no stone unturned," no matter the cost.

A better approach is to amend Rule 26(b)(1), which already establishes a two-tier system of discovery, with the second tier of information being discoverable only upon a showing of good cause.[250] The Advisory Committee should revise Rule 26(b)(1) as follows:[251]

> (1) **In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things *that are reasonably accessible or are in fact accessed*, and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action *and the court may order a party to produce inaccessible, but retrievable data.* Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).[252]

This language is preferable to the proposed amendments to Rule 26(b)(2) for several reasons. First, it maintains and utilizes the existing format and content of the Federal Rules. Rule 26(b)(1) determines whether a particular

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249. *See supra* Section VI.B.3.

250. FED. R. CIV. P. 26(b)(1).

251. The author's proposed changes to Rule 26(b)(1) are indicated by italicized text.

252. FED. R. CIV. P. 26(b)(1).

matter or type of information is discoverable and whether it requires a showing of "good cause."[253] All discovery, even that requiring a showing of good cause, is subject to the limitations of Rule 26(b)(2).[254] The revised language proposed by this Article would maintain the same checklist and would apply it in the same manner as it is applied by the existing Federal Rules.

Second, application of the proportionality test of Rule 26(b)(2) remains unchanged. All discovery, even "accessible" information, continues to be subject to the limitations of the proportionality test. Third, the language proposed by this Article makes clear that information actually accessed by a party is discoverable, even if accessing it required great efforts.[255] Fourth, the language proposed by this Article still permits the responding party to attempt to shift the costs of discovery for any information—whether "accessible" or not—that is extremely costly to produce, yet has little relevance. Fifth, the language I have proposed applies to all documents that are not "reasonably accessible," regardless of whether they are "electronically stored."

D. Establishing That a Party Is Required to Produce Electronically Stored Information in Only One Form, Unless a Court Orders Otherwise for Good Cause

As noted above, the Federal Rules provide that the producing party must translate information "into reasonably usable form" under certain circumstances.[256] The Rules, however, do not specify whether the producing party must produce electronic information in multiple forms, such as producing information in both electronic and hard copy form.[257] In addition,

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253. *Id.*

254. *Id.*

255. Although the Discovery Subcommittee recognized this concern, it failed to adequately resolve it. *See* Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 22 n.15 (questioning that "[i]f a party decides to mine ordinarily inaccessible stuff to get good evidence, should we override the duty to disclose that material under Rule 26(a)(1)(B) (along with the duty to supplement under Rule 26(e))?" and concluding that if a responding party dredges up material that is inaccessible, "[b]y the time they have been dredged up, they are no longer inaccessible, so it would seem that the exemption specified in the text would not apply").

256. FED. R. CIV. P. 34(a).

257. *See* Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 18 nn.10-11. In their article discussing electronic discovery and Rule 34, Scheindlin and Rabkin noted:

> The *Hasbro*, *Matsushita* and *Williams* line of cases provide examples of how courts must analogize to paper discovery in order to resolve electronic discovery issues that are not specifically addressed in Rule 34. Their failure to agree on whether respondents must produce both hard copy and electronic versions of discoverable information represents an example of the conflicting case law that exists with respect to crucial electronic discovery issues.

Scheindlin & Rabkin, *supra* note 4, at 356. Some courts have concluded that Rule 34 requires the responding party to produce electronic evidence in an electronic form as well as in hard

if only one form is required, the Federal Rules do not resolve the question of which party chooses the form of production.

1. The Advisory Committee's Proposed Changes to Rule 34(b)

The Advisory Committee proposed the following changes to Rule 34(b):[258]

> **(b) Procedure.** . . . The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form in which electronically stored information is to be produced.
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> The party upon whom the request is served shall serve a written response within 30 days after the service of the request. . . . The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form for producing electronically stored information stating . . . the reasons for the objection . . . .
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> Unless the parties otherwise agree, or the court otherwise orders,
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> . . . .
>
> (ii) if a request for electronically stored information does not specify the form of production, a responding party must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form. The party need only produce such information in one form.[259]

The Discovery Subcommittee considered whether specification of the requested form of disclosure or discovery should be mandatory or permissive.[260] Making the specification mandatory may "facilitat[e] discovery generally and forestal[l] demands that material produced in one form be re-produced in another form."[261] If the specification were permissive, however, this option may be helpful to a requesting party who may not know which format it would prefer or what format, technology, and software the other

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copy. *See id.* at 355-56; *see e.g.*, Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94Civ.2120, 1995 WL 649934, at *1 (S.D.N.Y. Nov. 3, 1995) (recognizing that "the producing party can be required to design a computer program to extract the data from its computerized business records"); Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1261-63 (E.D. Pa. 1980) (holding that Rule 34 requires a party to produce electronic evidence in electronic format as well as in hard copy). *But see* Williams v. Owens-Illinois, Inc., 665 F.2d 918, 932 (9th Cir. 1982) (refusing to reverse the trial court's holding that plaintiffs could not discover defendant's computer tapes where defendant had produced all of the data in hard copy).

258. The Advisory Committee's proposed changes to Rule 34(b) are indicated by underlined text.

259. PROPOSED AMENDMENTS, *supra* note 1, at 26-27.

260. *See* Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 16 n.7.

261. *Id.* at 18.

parties use.[262] Although "technological developments may make this issue less important in the future,"[263] the Advisory Committee ultimately chose the permissive language.[264]

The Advisory Committee also proposed similar changes to Rule 33:[265]

> **(d) Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, <u>including electronically stored information,</u> of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.[266]

2. The Standing Committee Should Recommend Amending the Federal Rules to Provide That a Party Need Only Produce a Data Compilation in the Form in Which It Is Maintained —Unless a Court Orders Otherwise for Good Cause

The Federal Rules should be amended to provide that a party need only produce a data compilation in the form in which it is maintained, absent a court order. The Advisory Committee's proposed language, however, should not be adopted. First, the proposal again requires the creation of a new, defined term: "electronically stored information."[267] The Advisory Committee should instead use the inclusive and encompassing phrase "data compilations," which is already employed in the Federal Rules.[268]

Second, the Advisory Committee's proposed language requires production in only one of the forms in which the information is "ordinarily maintained."[269] More effective language would require production of a data compilation in each form that it is maintained. If the responding party maintains both hard copy and electronic versions of a data compilation, it should produce both—or

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262. *Id.* at 18-19; *see* Advisory Committee Memo, May 2004, *supra* note 1, at 42.

263. Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 19.

264. PROPOSED AMENDMENTS, *supra* note 1, at 26 (amending Rule 34(b) to provide that "[t]he request may specify the form in which electronically stored information is to be produced").

265. The Advisory Committee's proposed changes to Rule 33 are indicated by underlined text.

266. PROPOSED AMENDMENTS, *supra* note 1, at 22-23.

267. *Id.* at 26.

268. FED. R. CIV. P. 34(a).

269. *See* PROPOSED AMENDMENTS, *supra* note 1, at 27.

at least offer to produce both. Although this will require an initially greater production by the producing party than that envisioned by the Advisory Committee, the requirement would not impose a significant burden on the producing party and it would likely create a stronger presumption that compliance with the Rule is all that is required. Consequently, it would limit the occasions on which the court must resolve disagreements about the form of production and whether a party established "good cause" warranting additional form of production. The Standing Committee should recommend language that provides that the producing party has presumptively satisfied its production obligation if it produces (or has offered to produce) a data compilation in each form in which it is maintained. Such language would obviate the need for the requesting party to specify a form of production. Both parties would be on notice that electronic information will be produced in each of the forms in which it is maintained. This, combined with the requirement that the parties discuss discovery of electronic information as part of the Rule 26(f) conference,[270] will still allow the parties to discuss alternative arrangements. For example, both parties might agree that electronic information should be produced exclusively in hard copy form. If they cannot reach agreement on an alternative to the presumptive form of production, the parties would begin the meet and confer process.

Third, the Advisory Committee's proposal does not address the existing language of Rule 34(a) that states that a "document" includes "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."[271] Nor does this proposal address the Advisory Committee's Notes to the 1970 amendment, which indicate that

> when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data.[272]

Rule 34(a) and the accompanying committee note reflect that the responding

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270. *See supra* Section VI.A.

271. FED. R. CIV. P. 34(a).

272. *Id.* at advisory committee's note on 1970 amendment. The Advisory Committee Notes further provide:

> The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronics [sic] data compilations from which information can be obtained only with the use of detection devices . . . . The burden thus placed on respondent [to translate the data into usable form] will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs.

Id.

party may have to reduce a data compilation to hard copy if the *only* way to translate the information into "reasonably usable form" is through the use of that party's devices.[273] The Advisory Committee's proposed change to Rule 34(b) appears to conflict with Rule 34(a). The language proposed by this Article would accomplish the same result as the Advisory Committee's proposal and would also harmonize Rules 34(a) and (b).

Fourth, the Advisory Committee's proposed new language for Rule 33—adding to subpart (d) to allow the responding party the option of producing electronically stored information where the answer to an interrogatory may be derived from such records—is unnecessary. Rule 33 currently provides that a responding party may elect to permit "an examination, audit or inspection of [its] business records, including a compilation, abstract or summary thereof" if "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served."[274] Thus, the new "option" proposed by the Advisory Committee is an option that the Federal Rules already provide.

The Standing Committee instead should recommend the following new language for Rule 34(b):[275]

> **(b) Procedure.** . . . A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to the categories in the request. *A party producing a data compilation shall produce it in each form in which it is maintained. In addition, when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent shall translate the data into usable form. Unless the court orders otherwise for good cause, a party producing a data compilation need only produce it in the form(s) in which it is maintained or, if applicable, the form to which it is translated.*

If the members of the Advisory Committee believe that the proposed language might be interpreted to preclude the parties' agreement otherwise, the Committee may consider adding a note that emphasizes that the parties can always agree to only a single form of production or to a different form of production than the form dictated by the proposed rule. In addition, it would be preferable to emphasize that the requirement to translate data compilations into usable form is applicable only when the data can be made usable by *no other means* than respondent's devices. Absent unusual circumstances, the respondent should not have to create new forms of the data. Similarly, there should be a presumption that the discovering party and its attorneys ordinarily

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273. *Id.* It does not appear necessary for the respondent to reduce the data to hard copy where the discovering party or its attorneys possess, or reasonably can obtain the necessary software or hardware.

274. FED. R. CIV. P. 33(d).

275. The author's proposed changes to Rule 34(b) are indicated by italicized text.

possess, or can obtain, the programs, software, or other devices necessary to make the data compilations usable.

My proposal deliberately omits language to protect against disclosure of proprietary information when data compilations are produced in electronic form.[276] Data compilations may contain or reveal trade secrets of the litigants and their production also may raise licensing issues or involve trade secrets of third parties.[277] Rule 26(c) and the comments to Rule 34, however, adequately address this issue and permit a court to issue a protective order that is appropriately tailored to the circumstances of a particular case.[278]

E. Lessening the Burden Created by the Need to Review Documents for Privileged Information and Protecting Against Inadvertent Privilege Waiver

The Advisory Committee has proposed language to amend Rule 26(b) to address the burden created by the need to review documents for privileged information and to protect against inadvertent privilege waiver.[279] The burdens faced by the responding party when reviewing documents for privileged material are not unique to discovery of electronic information.[280] Litigants frequently complain about the burden and expense of conducting an adequate review of documents to protect against inadvertent disclosure of privileged information and the related effects of waiving the privilege.[281] In

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276. Judge Scheindlin and Jeffrey Rabkin note that electronic evidence is different from hard copy documents because "[e]lectronic [e]vidence [o]ften [c]ontains [p]roprietary [c]haracteristics." Scheindlin & Rabkin, *supra* note 4, at 362-64. Scheindlin and Rabkin propose "[a]mending Rule 34 to [r]educe [j]udicial [i]ntervention and to [h]arness the [p]otential of [c]omputerized [d]ocument [p]roductions" by adding to Rule 34. *Id.* at 374. Their addition is as follows:

> All electronically-stored information shall be produced in the same form in which it is stored, presumptively subject to a protective order under Rule 26(c)(7) barring the release of such information to third parties other than the requesting party's expert witnesses. Any party represented by counsel requesting the production of electronically-stored information in printed form in addition to, or instead of, its electronic form shall bear all costs associated with the requested production.

Id. at 374.

277. *See id.* at 362-64; Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 19.

278. See FED. R. CIV. P. 26(c); FED. R. CIV. P. 34 advisory committee's note on 1970 amendment ("Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, [confidentiality] of nondiscoverable matters, and costs.").

279. PROPOSED AMENDMENTS, *supra* note 1, at 7.

280. *See supra* Section III.B.

281. The Advisory Committee "has repeatedly been advised that privilege waiver, and the review required to avoid it, add to the costs and delay of discovery." Advisory Committee Memo, May 2004, *supra* note 1, at 50. For example, during discussion on this issue, one

fact, the Discovery Subcommittee addressed this issue prior to its consideration of issues "unique" to electronic discovery.[282] Therefore, the Advisory Committee's proposal is not limited to electronically stored information.[283]

Any attempt to amend the Federal Rules to address privilege issues may be invalid unless approved by Congress. 28 U.S.C. § 2074(b) provides that "[a]ny such rule [adopted pursuant to the Rules Enabling Act] creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."[284] Although, the Discovery Subcommittee acknowledged this potential problem,[285] it nevertheless recommended language that would attempt to protect against privilege waiver.[286]

1. The Advisory Committee's Proposed Amendments to Address a Belated Assertion of Privilege

The Advisory Committee has proposed amending Rule 26(b)(5) by dividing it into two subsections.[287] Subsection (A) consists of the existing language of Rule 26(b)(5) and subsection (B) proposes to permit a party who has already produced information in response to a discovery request to make

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Discovery Subcommittee member "recounted a recent experience in which [the full-scale privilege review in a document-intensive case] involved 27 people working full time for six weeks, not just 9 to 5 on weekdays." Notes on Discovery Subcommittee Meeting, *supra* note 19, at 6.

282. Marcus Rule Changes Memo, Sept. 2002, *supra* note 85, at 9; *see also* Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 28, 44 ("The privilege waiver problem has been on the Subcommittee's agenda for a long time . . . .").

Professor Marcus observed:

> For some time, the Subcommittee has reflected on whether Rule 34(b) could be productively amended to implement court orders insulating some initial disclosure to the other side against the waiver consequence, thereby hopefully focusing the responding party's privilege review on a much smaller collection of materials deemed relevant by the discovering party.

Marcus Rule Changes Memo, Sept. 2002, *supra* note 85, at 9.

283. Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 28; Notes on Discovery Subcommittee Meeting, *supra* note 19, at 5-6; *see* PROPOSED AMENDMENTS, *supra* note 1, at 7.

284. 28 U.S.C. § 2074(b) (2000).

285. *See* Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 52-53; Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 28.

286. Lynk & Marcus Memo, Apr. 2004, *supra* note 8, at 49-50.

287. PROPOSED AMENDMENTS, *supra* note 1, at 7-8.

a belated assertion of privilege—sometimes known as a "claw back" procedure.[288] The Advisory Committee's proposed Rule 26(b)(5)(B) provides:[289]

> **(B)** ***Privileged information produced.*** When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.[290]

The proposed amendment "does not address whether there has been a privilege waiver."[291] It simply "provide[s] a procedure for a party that has produced privileged information without intending to waive the privilege to assert that claim and permit the matter to be presented to the court for its determination."[292] The proposed amendment of Rule 26(b)(5)(B) must be considered in the light of the proposed amendments to Rule 26(f)(3) (directing the parties to discuss privilege issues) and Rule 16(b) (alerting the court to consider in its case management order whether to provide for protection against waiver of privilege).

2. The Standing Committee Should Not Recommend Amending the Federal Rules to Address the Review of Documents for Privileged Information

The Advisory Committee should not recommend amending the Federal Rules to address the review of documents for privileged information. First, such amendments might be construed as "creating, abolishing, or modifying

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288. *Id.* The claw back procedure is distinguished from the "quick peek" approach in which the producing party gives the requesting party a quick peek at the entire universe of responsive material to select a smaller subset of materials to be formally produced. *See* Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 32. Professor Marcus noted that the quick peek approach

> might be of considerable assistance in relation to discovery of electronically-stored data. Discovery regarding electronically-stored materials may involve having one party query its computer system according to directions from the other side. At the time the query is used, the parties don't know what it will elicit, much less whether that might be privileged. So a quick look might be helpful in that situation.

Id. This result can be accomplished (and often is) through court appointment of a neutral. *Id.* In addition, there is no request by the courts to eliminate this procedure.

289. The Advisory Committee's proposed changes to Rule 26(b)(5) are indicated by underlined text.

290. PROPOSED AMENDMENTS, *supra* note 1, at 7.

291. *Id.* at 15.

292. *Id.*

an evidentiary privilege" and therefore would not have any effect unless approved by Congress.[293] One can imagine a party relying on such an amendment only to find later that the protection offered by the amended rule was a mirage.

Second, the proposed inclusion of a "reasonable time" period is certain to engender a significant amount of litigation as to how long after disclosure must a party seek return of privileged materials. The Advisory Committee Note states that

> [m]any factors bear on whether the party gave notice within a reasonable time in a given case, including the date when the producing party learned of the production, the extent to which other parties had made use of the information in connection with the litigation, the difficulty of discerning that the material was privileged, and the magnitude of production.[294]

Given the significance of maintaining the privilege, cautious attorneys will continue to refuse to produce any information until it has been reviewed for privilege. The proposed amendment fails to provide certainty to a party that it will not have waived its privilege. If the proposed rule is enacted, each judge will have a different view of what is "reasonable." Furthermore, the proposed rule does not provide any guidance to the parties or the court on what is a reasonable period of time. If the requesting party has already used the information at a deposition or in a motion, especially a motion for summary judgment, will the producing party's subsequent claim of privilege fall within a reasonable period of time? Has the producing party given notice within a reasonable period of time if it claims privilege after the requesting party has reviewed the documents and identified the "relevant" documents that will be used in the litigation? These unanswered questions (1) increase the likelihood that the timing of the producing party's request for the return of the "privileged" materials will be affected by tactical reasons and (2) suggest that implementation of this amendment will result in abuse and increased costs.

The proposed changes are likely to result in a significant increase in litigation over "privileged" materials. The proposed changes do not set forth a specific procedure for resolution of "privilege" disputes. Nor do they specify the standard of "reasonableness" that will be applied to the producing party's conduct. Is there a requirement of "diligence"? If so, the documents must be reviewed for privilege and the proposed change is mostly meaningless.

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293. 28 U.S.C. 2074(b) (2000). In Texas, the producing party does not waive a claim of privilege if it amends its response within ten days of the date that the party became aware that it has produced privileged information. TEX. R. CIV. P. 193.3(d). Despite initial trepidation, this provision apparently has been embraced by both plaintiffs and defendants. Notes on Discovery Subcommittee Meeting, *supra* note 19, at 6. Texas, however, does not have an equivalent to 28 U.S.C. 2074(b).

294. PROPOSED AMENDMENTS, *supra* note 1, at 15.

Third, the responding party's attorneys may be practically, legally, or ethically obligated to conduct a full privilege review.[295] For example, in California, it is an attorney's duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."[296] Before making a disclosure of potentially privileged matters, the attorney must consider whether the disclosure may effect a waiver of the privilege as against third parties. For example, a disclosure made in a federal case might effect a waiver of the attorney client privilege for those same materials in a later state case.[297] The language under consideration does not account for these likely scenarios and might give unsuspecting attorneys a false sense of security. Additionally, it may encourage an overburdened (or lazy) attorney to produce documents without conducting a review for privilege on the theory that he can conduct such a review after production has occurred.

F. Creating a "Safe Harbor" from Sanctions for Routine Destruction of Responsive Information

The Discovery Subcommittee identified two primary issues relating to a party's obligation to preserve documents under the Federal Rules. First, "when [does] the duty to preserve arise"?[298] Second, "what must be done to preserve evidence once the obligation to preserve is triggered"?[299] Although the Discovery Subcommittee had recommended amendments to address both issues,[300] the Advisory Committee ultimately chose to address only the latter issue.[301] The proposal would create a "safe harbor" from the imposition of sanctions for a party that unwittingly destroyed responsive information as a result of "the routine operation of the party's electronic information

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295. Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 53 ("When these issues have been discussed in prior Committee meetings, it has not been clear that much time would be saved. Some feel that no careful lawyer would allow the other side to inspect documents, even subject to such provisions, before reviewing them all to remove privileged materials.").

296. CAL. BUS. & PROF. CODE § 6068(e)(1) (Supp. 2004).

297. *See e.g.*, CAL. EVID. CODE § 912(a) (Supp. 2004). Section 912(a) provides:

> [T]he right of any person to claim . . . privilege . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, *including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.*

Id. (emphasis added).

298. Marcus Rule Changes Memo, Sept. 2002, *supra* note 85, at 4.

299. *Id.* at 5.

300. *See* Marcus Advisory Committee Memo, Sept. 2003, *supra* note 20, at 37-39.

301. PROPOSED AMENDMENTS, *supra* note 1, at 31-32.

system."[302] The Advisory Committee elected not to address the issue of when the duty to preserve arises.

1. The Advisory Committee's Proposals

The Advisory Committee proposed amending Rule 37 by adding subsection (f):[303]

> **(f) Electronically Stored Information.** Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
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> **(1)** the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
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> **(2)** the failure resulted from loss of the information because of the routine operation of the party's electronic information system.[304]

Professor Marcus has noted that "there is a [substantial] body of statutory and regulatory law[305] about what records various sorts of enterprises must retain and for how long."[306] The Advisory Committee's proposal, which is limited to retention of electronically stored materials, does not establish or

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302. *Id.* at 32.

303. The Advisory Committee's proposed changes to Rule 37 are indicated by underlined text.

304. PROPOSED AMENDMENTS, *supra* note 1, at 31-32. The Advisory Committee also indicated that it "is continuing to examine the degree of culpability that will preclude eligibility for a safe harbor from sanctions in this narrow area." *Id.* at 32 n.**. The Advisory Committee provided an example, "to focus comment and suggestions[,]" of a version of Rule 37(f) framed in terms of intentional or reckless failure to preserve information. *Id.* The example is as follows:

> (f) **Electronically Stored Information.** A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:
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> (1) the party intentionally or recklessly failed to preserve the information; or
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> (2) the party violated an order issued in the action requiring the preservation of the information.

Id.

305. *E.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15, 18, 28, and 29 U.S.C.A.); SEC Rule 17a-4, 17 C.F.R. § 240.17a-4(b) (2002).

306. *See* Marcus Rule Changes Memo, Sept. 2002, *supra* note 85, at 4; *see also* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 313-14 & n.21 (S.D.N.Y. 2003) (Zubulake I) (discussing SEC regulations which require every broker and dealer to preserve for at least three years "[o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such" (quoting 17 C.F.R. § 240.17a-4(b) and (4))).

mandate what information must be retained. Instead, the proposal attempts to avoid issues relating to substantive obligations to preserve by limiting the safe harbor to a restraint on sanctions pursuant to Rule 37.[307]

2. The Standing Committee Should Recommend Amending Rule 26(b) to Set Forth a Party's Obligation to Preserve Discoverable Materials

There are several reasons why the Standing Committee should recommend adopting new language in Rule 26(b) that obligates a party to preserve discoverable materials. First, there is presently no Federal Rule that explicitly addresses a party's obligation to preserve discoverable materials.[308] Establishing a clear standard would likely limit the need for parties to seek data preservation orders.[309] Second, adoption of a clear standard, when combined with amending the Federal Rules to provide that inaccessible information is generally not discoverable, will allow litigants to honor their preservation obligations without bringing their businesses and lives to a halt. Adopting a new standard will also make it possible for the parties' attorneys to provide a clear set of instructions on what materials must be preserved under the Federal Rules. Third, by establishing a clear standard for preservation of discoverable information, the Federal Rules can create uniformity by providing an example that state courts may be inclined to adopt.

The amendment should not be limited, however, to electronically stored information. If the Federal Rules are amended to define the preservation obligation, they should establish a clear and certain standard that applies to all discoverable information. This will allow parties to establish document retention plans that are effective and efficient, and it will provide clear guidelines for parties and their attorneys when they become aware of the threat or fact of litigation.[310] Rule 26(b) is the appropriate place to establish the

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307. Notes on Discovery Subcommittee Meeting, *supra* note 19, at 11.

308. *Id.*

309. The need for data preservation orders was one of the frequently mentioned possibilities in the Federal Judicial Center's report. FJC Study, *supra* note 11, at 1, 14.

310. One commentator, who is general counsel for a large corporation, described this Hobson's choice:

> At any given time, large commercial and governmental users may be defending hundreds of cases, all started at different times and all alleging different claims. When each successive litigation requires restriction on the reuse of backup tapes because of the mere possibility that some needle might be found in a massive electronic haystack, the entity finds itself in the unenviable position of converting its backup systems into de facto litigation storage barns, a burden never intended by the Federal Rules. Indeed, the inadvertent failure to produce backup tapes held for one pending case in a successive case has led to sanctions—including spoliation inferences—when judged in retrospect. This is an unworkable standard that forces large users to choose between maintaining their normal business operations and surrendering valid claims or defenses.

Allman, *supra* note 43, at 208 (footnotes omitted).

preservation obligation. As noted above,[311] Rule 26(b) establishes the scope and limits of discovery,[312] and the proposed amendments addressing "inaccessible" information dovetail with the preservation obligation.

The Standing Committee should recommend adding the following language to Rule 26(b) in the form of a new subsection, 26(b)(6):[313]

> **(6) Preservation Obligations.** . . . *When a party reasonably should know that evidence may be relevant to anticipated litigation, that party must preserve those documents and tangible things that are discoverable pursuant to Rule 26(b)(1) and are reasonably accessible. Upon notice of commencement of an action, a party shall preserve a single day's full set of inaccessible materials that it stores for disaster recovery or otherwise maintains only as backup data. A party need not preserve materials beyond those described unless the court so orders for good cause.*

In addition, the Advisory Committee should include a note that Rule 26 is not intended to displace any other requirement (statutory, regulatory, or otherwise) that dictates what records a party must retain and for how long. Instead, Rule 26 supplements such requirements.[314]

The language proposed by this Article acknowledges that the duty to preserve arises prior to the filing of a lawsuit.[315] The Advisory Committee provides no guidance in this regard. Consistent with the proposed amendments to Rule 26, the language proposed by this Article distinguishes between generally discoverable material and inaccessible material.[316] The

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311. *See supra* Section IV.B.

312. FED. R. CIV. P. 26(b).

313. The author's proposed changes to Rule 26(b) are indicated by italicized text.

314. "[T]here is a body of statutory and regulatory law about what records various sorts of enterprises must retain and for how long. Should a Civil Rule attempt to displace those retention requirements? If not, would the 'safe harbor' that might be provided by a rule really be safe?" Marcus Rule Changes Memo, Sept. 2002, *supra* note 85, at 4. The Federal Rules cannot provide certainty that a party has complied with all preservation obligations—wherever they arise. But they can provide, and should provide, certainty that a party has complied with all of the preservation obligations arising from the Federal Rules.

315. *See, e.g.*, Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) (Zubulake IV). The *Zubulake IV* court explained, "'The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.'" *Id.* at 216 (quoting Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)). The concept that the duty to preserve arises as soon as it is possible to "anticipate litigation" builds on the idea that materials prepared in anticipation of litigation are not discoverable as set forth in Rule 26(b)(3). *See* Marcus Rule Changes Memo, Sept. 2002, *supra* note 85, at 5.

316. *See supra* Section VI.C.2. The *Zubulake IV* court addressed the issue as follows:

> The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant

obligation to preserve inaccessible material is only triggered upon the filing of a lawsuit, and then the obligation only exists to take a single day's "snapshot" and preserve it.[317] This balances the need to preserve even "inaccessible" data—in the event that the party seeking discovery obtains a court order compelling production of such material for good cause—with the needs of a business to continue to operate.[318] The language proposed by this Article works in tandem with the amendments to Rule 26 that are discussed in Section VI.C.2.

3. The Standing Committee Should Recommend Against Amending Rule 37

The Advisory Committee should recommend against amending Rule 37 because its proposal is limited to providing a safe harbor against sanctions for spoliation of electronically stored information.[319] The issue of spoliation of electronically stored information does not require special treatment in the Federal Rules. Storing hard copy information is more burdensome and expensive than storing computerized information. Thus, the need for routine destruction of hard copy documents is arguably greater than the need for

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documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (*i.e.*, actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.

Zubulake IV, 220 F.R.D. at 218.

317. The *Zubulake IV* court noted:

A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter. . . . For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents.

Zubulake IV, 220 F.R.D. at 218.

318. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 73, § 11.442, at 72-73 (advising a court to "discuss with counsel at the first opportunity the need for a preservation order" because such an order may "interfere with the normal operations of the parties and impose unforeseen burdens"). According to the Sedona Conference Working Group, "The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data." *Sedona Principles* 2004, *supra* note 15, at 20. "The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronic data and documents were inadequate." *Id.* at 30.

319. PROPOSED AMENDMENTS, *supra* note 1, at 31-32.

routine destruction of computerized information. Second, the imposition of sanctions and "'[t]he determination of an appropriate sanction . . . [are] confined to the sound discretion of the trial judge, and [they are] assessed on a case-by-case basis.'"[320] "The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's own inherent powers."[321] Thus, the Advisory Committee's proposed Rule might provide a false harbor because a court may not limit its inquiry to the concepts set forth in the Advisory Committee's proposal. Fourth, while there has been a demand by the bar to clarify the duty to preserve, there has been no call to clarify the requirements for imposition of sanctions.

Amendment of Rule 37 is also unnecessary given the proposal to amend Rule 26(b)(2) to clarify the duty to preserve. That amendment should provide sufficient guidance to parties and the court. Furthermore, the courts are currently establishing a framework to assess requests to impose sanctions for spoliation. In *Zubulake IV*, the court discussed and applied such a framework in a case involving spoliated electronic evidence:

> A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that [the evidence] would support that claim or defense. In this circuit, a "culpable state of mind" for purposes of a spoliation inference includes ordinary negligence. When evidence is destroyed in bad faith (*i.e.*, intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking sanctions.[322]

VII. CONCLUSION

There are compelling reasons to amend the Federal Rules to address discovery of electronic information. The Federal Rules fail to address the three true differences between discovery of electronic information and discovery of hard copy information. Amending the Rules will provide needed guidance to litigants, their attorneys, and the courts. However, the amendments proposed by the Advisory Committee should not be adopted, for the most part. The Advisory Committee's proposals do not adequately address the differences between discovery of electronic information and hard copy information. Additionally, they are inconsistent with the language and framework of the Federal Rules. This Article proposes amendments that

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320. *See Zubulake IV*, 220 F.R.D. at 216 (quoting *Fujitsu*, 247 F.3d at 436).

321. *Id.*

322. *Id.* at 220 (footnotes omitted).

address these true differences while remaining loyal to the existing language and framework.

The Standing Committee should recommend four amendments to the Federal Rules regarding discovery.[323] First, the Standing Committee should recommend amending Rules 26(f) and 16(b) to require the parties to meet and confer regarding data compilations and other issues raised by discovery of electronic information. Rule 26(f) should be amended as follows:

> **(f) Conference of Parties; Planning for Discovery**. . . . the parties must . . . 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:
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> . . . .
>
> (3) any issues relating to disclosure or discovery of *data compilations*, including the form in which the data should be produced;[324]

Rule 16(b) should be amended in the following manner: "The scheduling order may also include . . . (5) provisions for disclosure or discovery of *data compilations . . . whether any party anticipates disclosure or discovery of data compilations, and if so what arrangements should be made to facilitate management of such disclosure or discovery.*[325]

Although these amendments will require the parties to consider the issues raised by electronic discovery at an early stage, they also will provide the parties with flexibility to determine whether the case should involve electronic discovery issues.

Second, the Standing Committee should recommend the following new language for Rule 26(b)(1) to provide that inaccessible material is generally not discoverable:

> **(1) In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things *that are reasonably accessible or are in fact accessed*, and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action *and the court may order a party to produce inaccessible, but retrievable data.* Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All

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323. Throughout Section VII, the Advisory Committee's proposed changes to the Federal Rules are indicated by underlined text and the author's proposed changes are indicated by italicized text.

324. PROPOSED AMENDMENTS, *supra* note 1, at 8-9.

325. *Id.* at 1-2.

discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii) and (iii).

This amendment will clarify the proper scope of discovery by drawing a distinction between accessible and inaccessible materials. Accessible materials are discoverable. Inaccessible materials that are retrievable are discoverable upon a showing of good cause. The distinction is a flexible distinction that requires a case-by-case determination of whether the material is inaccessible but retrievable. This amendment addresses one of the truly unique aspects of electronic information—legacy data. This amendment does not draw a distinction between electronic information and other information. It also does not limit a party's opportunity to object and argue that the discovery sought (whether accessible or inaccessible) is subject to the proportionality test (and other limitations) imposed by Rule 26(b)(2).

Third, the Standing Committee should recommend amending Rule 26(b) by adding a new subsection (6) that sets forth a party's preservation obligations:

> **(6) Preservation Obligations:** *When a party reasonably should know that evidence may be relevant to anticipated litigation, that party must preserve those documents and tangible things that are discoverable pursuant to Rule 26(b)(1) and are reasonably accessible. Upon notice of commencement of an action, a party shall preserve a single day's full set of inaccessible materials that it stores for disaster recovery or otherwise maintains only as backup data. A party need not preserve materials beyond those described unless the court so orders for good cause.*

This amendment dovetails with the new language for Rule 26(b)(2) and provides specific guidance regarding which materials must be preserved in advance of litigation and which materials must be preserved only when litigation has commenced. The language in this amendment also addresses another "unique" aspect of electronic information—its dynamic nature. Again, the amendment does not distinguish between electronic and non-electronic information. It provides an opportunity, however, for a party to seek relief from the court if there is good cause to believe that additional documents must be preserved.

Fourth, the Standing Committee should recommend amending Rule 34(b) to establish a party's obligation to produce electronic information in each form in which it is maintained:

> **(b) Procedure.** . . . A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to the categories in the request. *A party producing a data compilation shall produce it in each form in which it is maintained. In addition, when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent shall translate the data into usable form. . . . Unless the court*

orders otherwise for good cause, a party producing a data compilation need only produce it in the form(s) in which it is maintained or, if applicable, the form to which it is translated.

This amendment clarifies what forms of electronic information must be produced, but leaves open the possibility of additional forms of production if good cause is established. In addition, it is consistent with, and builds on, the obligation to translate data into a usable form. Finally, this amendment provides certainty with respect to another unique aspect of electronic discovery—the fact that it can be produced in either an electronic or hard copy format.

PILLSBURY WINTHROP LLP

04-CV-050 Testimony

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December 27, 2004

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VIA FACSIMILE AND U.S. MAIL

Peter G. McCabe
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Washington, DC 20544

Re: January 12, 2005 Civil Rules Committee hearing in San Francisco, California

Dear Mr. McCabe:

Thank you for your letter of December 17, 2004 regarding my testimony at the January 12, 2005 hearing in San Francisco.

You have previously received a copy of an article I have written on these issues, entitled "Is E-Discovery So Different That It Requires New Discovery Rules? An Analysis of Proposed Amendments to The Federal Rules of Civil Procedure."

Enclosed please find a draft of the testimony I intend to offer.

Thank you for your attention to these matters. Please contact me if you have any questions.

Sincerely,

Henry S. Noyes

Enclosure

Written Testimony of Henry S. Noyes

I wish to thank the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for this opportunity to testify on the proposed amendments to the Federal Rules of Civil Procedure to address issues raised by discovery of electronic information. Thank you.

As background information, I am a partner at Pillsbury Winthrop LLP and I have practiced here in San Francisco for the last ten years. I have accepted, however, a position as an Associate Professor at Chapman University beginning in the Fall of 2005. I recently completed an article entitled "Is E-Discovery So Different That It Requires New Discovery Rules? An Analysis of Proposed Amendments to The Federal Rules of Civil Procedure." The article appears at 71 Tennessee Law Review 585 (2004). I have provided Secretary McCabe with a copy of the article. The article and my testimony here both reflect my personal views and do not necessarily represent the views or opinions of Pillsbury Winthrop LLP or its clients.

IS DISCOVERY OF ELECTRONIC INFORMATION DIFFERENT FROM DISCOVERY OF HARD COPY INFORMATION AND, IF SO, DO THE RULES ALREADY ADDRESS THESE DIFFERENCES?

Before assessing the proposed amendments to the Federal Rules, I thought it important to assess the presumption that discovery of electronic information is truly different from discovery of non-electronic information. If there are true differences, we should determine whether those differences require a special set of discovery rules.

My review of relevant commentary and the work of the Discovery Subcommittee of the U.S. Judicial Conference Advisory Committee on Civil Rules revealed six purported "differences" between discovery of electronic information ("EI") and hard-copy information: (1) EI is different because it is "new"; (2) Discovery of EI increases the likelihood of inadvertent disclosure of privileged information; (3) EI often requires on-site inspection of a party's computer system by an opposing party; (4) EI is subject to spoliation; (5) EI raises the issue of what form must the production take; and (6) EI increases the volume and cost of discovery.

EI is different because it is new: The advent of "new" technologies is not unique to EI. The FRCP have accommodated technological change over many years. One aspect of "newness" is, however, arguably unique to EI. Changing and evolving EI systems sometimes result in "legacy data"—electronic data that cannot be translated into usable form because the responding party no longer has the technology (or personnel to operate it) to translate the information. (Rule 34 assumes that EI can be translated "through detection devices into reasonably usable form.") This is one way in which EI is truly "different" and might warrant changes in the FRCP.

Discovery of Electronic Information Increases the likelihood of Inadvertent Disclosure of Privileged Information. Discovery of EI is no more problematic than discovery of hard copy information in large volume, document intensive cases. In fact, discovery of EI may decrease the likelihood of inadvertent disclosure of privileged information because EI usually includes metadata that contains the foundational information that is necessary to establish privilege—who created the EI, who edited it, who received and reviewed it and when.

EI often requires on-site inspection of a Party's Computer system by an opposing party. Discovery of EI may require on-site inspection of the producing party's computer by the requesting party. The requesting party does not know what it is getting, may need to view EI to determine proper scope of request, the EI may be useless outside of its native system or application and the EI system may contain privileged or proprietary information that cannot be separated from the requested, responsive, relevant information. This "difference" may be unique to EI, but the FRCP already address this difference by permitting the producing party to seek a protective order to protect against disclosure of privileged or proprietary information.

Spoliation of EI: The general issue of spoliation of evidence is not unique to EI. However, the dynamic nature of certain types of EI—changing and evolving without any human intervention (e.g., automatically deleted emails after set period of time, auto-generated dates, calculations of interest, update of inventory)—is unique to EI and might warrant amendment of the FRCP.

Form of Production Issues: EI may be produced in either its native, electronic format or, after reduction or translation, in hard copy. This "difference" might warrant amendment of the FRCP.

Increased Volume and Cost: As noted above, discovery of EI may involve increased volume of information and increased costs (although these "greater" costs may be minimized by ease and efficiency of handling EI), but this is no different than document intensive productions.

MY ANALYSIS OF THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

I discuss the proposed amendments in six general categories, recognizing that I have not addressed every proposed amendment. For ease of reference, I have set forth below the proposed changes to the Rules. Additions are indicated in underlined text and deletions are indicated in strikethrough text. Where I suggest an alternative proposal, I have indicated my proposed additions in italicized text. My analysis of the proposed amendments and my reasoning for an alternative is set forth in "My Testimony."

I. Expanding the Initial Discovery-Planning Session to Include Consideration of Electronic Information

The proposed amendment to Rule 26(f):

(f) Conference of Parties; Planning for Discovery.... [T]he parties must ... 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:...

...

(3) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced;

(4) whether on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information...."

My proposal:

(f) Conference of Parties; Planning for Discovery.... [T]he parties must ... 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:...

...

(3) any issues relating to disclosure or discovery of data or data compilations, including the form in which the data should be produced;

My testimony: It is helpful to require the parties to meet and confer about preservation of discoverable evidence and any issues that may relate to electronic

(or other) information. The language proposed by the Advisory Committee, however, ("electronically stored information") is new to the Rules. The phrase I have proposed ("data or data compilations") is taken from the existing language of Rule 34 and leaves more room for technological growth.

The amendments should not require the parties to meet and confer regarding "whether on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information...." This is only one of many specific issues that the parties might address. The Discovery Subcommittee considered several specific issues that the parties might discuss (such as cost-bearing), but correctly concluded that it would send an inappropriate message to require conference about only certain of these specific issues. The proposed language also implies that courts have the power to craft orders that limit privilege waiver and might encourage district courts to adopt blanket rules regarding privilege waiver. It also might produce the unintended effect of creating a myriad of different standing orders or even local rules relating to privilege waiver.

II. Revising the Current Definition of "Documents"

The proposed amendment to Rule 34:

> **(a) Scope.** Any party may serve upon any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test, or sample any designated electronically stored information or any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, images ... and any other data or data compilations in any medium—from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect, ~~and~~ copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served ....

The Advisory Committee also revised the title of Rule 34: "Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes."

My Proposal: No change to the existing Rule 34.

My testimony: There is no need to amend Rule 34 to define "documents" to include "electronically stored information." The Rules' definition of "documents" already includes such information. The 1970 amendments to Rule 34(a) defined the scope of "documents" as "including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." Fed. R. Civ. P. 34(a). The Advisory Committee's Notes explain that a requesting party may be entitled to inspect electronic and computer data and even the responding party's computer:

> The inclusive description of "documents" is [included] to accord with changing technology. It makes clear that Rule 34 applies to electronics [sic] data compilations from which information can be obtained only [through] the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. ... Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

Furthermore, courts have uniformly interpreted Rule 34 to include all types of information, however stored. The Advisory Committee's proposal is a step backward. The phrase "electronically stored information" is less inclusive than the phrase "other data compilations from which information can be obtained." Electronically stored information would not necessarily include chemically or biologically stored information, or even optical

disks. In fact, the proposed amendment requires the addition of a new modifier to the phrase "data compilations," which becomes "data compilations in any medium" to compensate for the limiting nature of the phrase "electronically stored information." The changes to the title of Rule 34 add to the impression that "Electronically Stored Information" is a separate category, not included within the universe of "documents" and "data compilations." See, e.g., FRCP 26(a)(1)(b) (requiring disclosure of "documents, data compilations and tangible things"... "the disclosing party may use to support its claims or defenses..."); 26(b)(1) ("documents or other tangible things"); 30(b)(5) ("production of documents and tangible things"); Rule 36(a) ("including the genuineness of any documents described in the request").

III. Establishing that "Not Reasonably Accessible" Electronic Data Is Discoverable Only Upon A Showing of Good Cause

The proposed new language for Rule 26(b)(2) is as follows:

(2) Limitations.... A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information sought is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

My proposal to amend Rule 26(b)(1):

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things *that are reasonably accessible, or are in fact accessed,* and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action *and the court* may *order a party to produce inaccessible, but retrievable data.* Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

My testimony: Establishing two tiers of information and distinguishing between information that is accessible and information that is not reasonably accessible are legitimate goals. It will minimize the need to retain outside experts or consultants to locate, retrieve and translate data from the producing party's information management systems. It also resolves the issue of "legacy data." Finally, incorporation of a flexible phrase such as "reasonably accessible" will accommodate evolving technology which will expand the universe of "accessible" information.

My proposal accomplishes this same goal, but does so within the framework of the existing rules. Rule 26(b)(1) already establishes a two tier analysis, with tier one information being presumptively discoverable and tier two information being discoverable only upon a showing of good cause. This is the appropriate place to incorporate a further refinement of the two tier analysis. My proposal also would not alter the application of the Rule 26(b)(2) proportionality test and the Rule 26(c) test. For example, it is unclear under the Advisory Committee's proposal whether the responding party may seek to shift the costs of discovery for producing information that is "reasonably accessible" yet extremely costly to produce and of little relevance.

My proposal also applies to each type of information that is "not reasonably accessible." (As discussed above, it is unwise to add the new, defined phrase "electronically stored information" to the Rules.) There is no justification for limiting the proposed amendment

language and analysis to "electronically stored information" that is not reasonably accessible. Why should inaccessible hard copy documents be treated differently? Examples include (a) documents in storage that are very difficult/very expensive to access, (b) documents converted to microfiche that are not searchable and not easily readable, and (c) documents kept haphazardly, with no indexing system, in quantities that make page-by-page searches impractical.

Finally, my proposal addresses the circumstance in which a party actually searches for and locates documents that are "not reasonably accessible."

IV. Establishing That a Party Is Required To Produce Electronically Stored Information in Only One Form, Unless a Court Orders Otherwise for Good Cause.

The proposed new language for Rule 34(b):

(b) Procedure.... The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. ... The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form for producing electronically stored information stating ... the reasons for the objection....

Unless the parties otherwise agree, or the court otherwise orders,

(ii) if a request for electronically stored information does not specify the form of production, a responding party must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form. The party need only produce such information in one form.

My proposal:

(b) Procedure. ... A party producing documents for inspection must produce them as they are kept in the usual course of business or organize them and label them to correspond to the categories in the request. *A party producing a data compilation shall produce it in each form in which it is maintained. In addition, when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent shall translate the data into usable form. Unless the court orders otherwise for good cause, a party producing a data compilation need only produce it in the form(s) in which it is maintained or, if applicable, the form to which it is translated.*

My testimony: Again, the Advisory Committee's proposal includes the new, defined term, "electronically stored information." Use of the existing phrase, "data compilations" is preferable. My proposal would require production of information in each form in which the information is maintained—both hard copy and electronic or other form. While this may require an initially greater production than that envisioned by the Advisory Committee, the requirement would not impose a significant burden and it would likely create a stronger presumption that compliance with the Rule is all that is required. This would limit the occasions on which the Court must resolve disagreement about the proper "form" and whether the requesting party established "good cause" warranting additional form(s) of production. The Advisory Committee's proposal is, by contrast, certain to invite and increase motion practice. Any burden created by my proposal also might be limited by the parties' meet and confer requirements under

Revised Rule 26. If it would be needlessly wasteful to produce information in more than one form, the parties may so agree. The cost to the requesting party of making copies of the multiple forms also will minimize the occasions on which production in multiple forms actually occurs.

My proposal also incorporates and implements the existing language of Rule 34 that states that a "document" includes "data compilations from which information can be obtained, translated, if necessary by the respondent through detection devices into reasonably usable form" to clarify that the information must be produced, if possible, in a usable form.

V. Lessening the Burden Created by the Need to Review Documents for Privileged Information and Protecting Against Inadvertent Privilege Waiver

The proposed new language for Rule 26(b):

> **(5)(B)** ***Privileged information produced.*** When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

My proposal: No change to the Rules.

My testimony: The Rules should not be amended to address the review of documents for privileged information. First, such an amendment might be construed as "creating, abolishing, or modifying an evidentiary privilege" contrary to the requirements of 28 U.S.C. 2074(b). The proposed amendment might give false hope to a practitioner who relies on it in the belief that it substantively protects against waiver of privilege. And what value is there in an amendment that does not provide such substantive protection? The proposal would allow a party who has in fact waived the privilege to request its documents back and then have a hearing?

The phrase "reasonable time" period is certain to engender a significant amount of litigation as to how long after disclosure must a party seek return of the privileged materials. Each judge will have a different view as to what is a reasonable amount of time—and possibly the view will differ even for the same judge depending on the facts of each case. Is it reasonable to request return of information used in a deposition? What about evidence submitted in support of a motion, especially a summary judgment motion?

Furthermore, the producing party's attorney is likely obligated (as a practical matter, a legal matter and as an ethical matter) to review the materials for privilege despite this "new" provision. In California, the ethical rules require all attorneys to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code 6068(e). Even if the disclosure in the federal case did not constitute a "waiver," the disclosure might constitute a disclosure in a later (or concurrent) state action. See, e.g., Cal. Evid. Code 912(a).

VI. Creating a "Safe Harbor" from Sanctions for Routine Destruction of Responsive Information

The proposed new language for Rule 37:

(f) Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:

(1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and

(2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

My proposal to amend Rule 26(b) in the form of a new subsection (6):

*(6) **Preservation Obligations.** When a party reasonably should know that evidence may be relevant to anticipated litigation, that party must preserve those documents and tangible things that are discoverable pursuant to Rule 26(b)(1) and reasonably accessible. Upon notice of commencement of an action, a party shall preserve a single day's full set of inaccessible materials that it stores for disaster recovery or otherwise maintains only as backup data. A party need not preserve materials beyond those described unless the court so orders for good cause.*

My testimony: There is presently no Rule that explicitly addresses a party's obligation to preserve discoverable information. The Rules should be amended to indicate both (a) when the preservation obligation arises and (b) what must be done to preserve evidence once the obligation to preserve is triggered. My proposal addresses and resolves both of these questions. It establishes clear standards that will limit the need for parties to seek data preservation orders from the court. It provides clear guidance to parties on their obligations to preserve inaccessible materials that will necessarily act as a "safe harbor" against the imposition of sanctions. Reasonably accessible materials that are discoverable must be preserved once a party becomes aware of the possibility of litigation. Once an action has been instituted, the party also must preserve a "snapshot" of its inaccessible materials. This allows the party to continue with the routine operation of its electronic, or other, information system. My proposal also works in tandem with the proposed changes to Rule 26 (distinguishing between information that is "reasonably accessible" and information that is not).

There is no justification for the proposal to limit a safe harbor against sanction to destruction of "electronically stored information." My proposal applies to all types of information.

04-CV-050
Supplement to Testimony 1/12 San Francisco

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01/14/2005 05:13 PM

To lee_rosenthal@txs.uscourts.gov, peter_mccabe@ao.uscourts.gov
cc
Subject Addendum to January 12, 2005 testimony

Dear Judge Rosenthal and Secretary McCabe:

Thank you again for the opportunity to testify before the Advisory Committee on Civil Rules in San Francisco on January 12, 2005.

I had one additional comment that I failed to make during my testimony. I offer it now for the Committee's consideration.

The comment relates to the proposed new language ("safe harbor") in Rule 37. I addressed this issue in my prepared written testimony at page 13.

The Committee's proposal incorporates the phrase "knew or should have known the information was discoverable...." My concern is that this (or even a higher standard of mens rea) will lead to litigation and attempts at discovery regarding the party's, and the party's attorneys', knowledge and mental state. This would likely lead to requests for discovery that invades the attorney-client privilege and--in order to prove lack of culpability--may force a party to disclose privileged information.

Again, thank you for the opportunity to testify and congratulations and thanks for all of your good work.

Henry Noyes.

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