David.Schieferstein@PMUSA.COM
01/06/2005 05:36 PM

To Rules_Comments@ao.uscourts.gov
cc
bcc
Subject Request to Testify

04-CV-078
Request to Testify
2/11 DC

Peter G. McCabe, Secretary

Committee on Rules of Practice and Procedure

Administrative Office of the United States Courts

Thurgood Marshall Federal Judicial Center Building

Washington, D.C. 20544

**Re: Testimony on Proposed Amendments to the Federal Rules of Civil Procedure Relating To Electronic Discovery**

Dear Mr. McCabe:

Philip Morris USA ("PM USA") requests an opportunity to provide testimony on the proposed amendments to the Federal Rules of Civil Procedure relating to electronic discovery at the public hearing scheduled for February 11, 2005 in Washington, D.C. Prior to the hearing, PM USA intends to submit written comments.

Thank you for this opportunity. If you need additional information, please contact me.

Sincerely,

**David Schieferstein, Counsel**
*Records Management & E-Discovery Support*
Philip Morris USA Law Department
West Broad Street - Litigation Support Center
(804) 484-8804 [direct dial]
(914) 272-0607 [direct e-fax]
615 Maury Street, Richmond, VA 23224 [shipping address]
P.O. Box 26603, Richmond, VA 23261 [mailing address]

04-CV-078
Testimony 2/11 DC

# PHILIP MORRIS USA

6601 WEST BROAD ST. • RICHMOND, VA 23230-1723 • 804.274.2000
www.philipmorrisusa.com

JOSE LUIS MURILLO, JR.
VICE PRESIDENT & ASSOCIATE GENERAL COUNSEL

804.484.8445
E-FAX: 914.272.0520

February 9, 2005

**By Hand and E-Mail**

Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Office of Judges Programs, Suite 4-170
1 Columbus Circle, N.E.
Washington, D.C. 20544

Re: Comments of Philip Morris USA Inc. In Response To The Proposed Amendments to the Federal Rules of Civil Procedure Concerning Discovery of Electronically Stored Information

Dear McCabe:

Enclosed are the written comments of Philip Morris USA Inc. in response to the proposed amendments to the Federal Rules of Civil Procedure addressing the discovery of electronically stored information.

Thank you for the opportunity to share our views on the proposed amendments.

Sincerely,

Jose Luis Murillo, Jr.

Enclosure

# Comments Of Philip Morris USA Inc. In Response To The Proposed Amendments To The Federal Rules Of Civil Procedure Concerning The Discovery Of Electronically Stored Information

**February 9, 2005**

Philip Morris USA Inc. ("PM USA" or "the Company") thanks the Committee for the extraordinary effort underlying the proposed amendments to the Federal Rules of Civil Procedure (the "Proposed Rules") that address the unique issues and challenges presented by the discovery of electronically stored information.

As Judge Scheindlin remarked in her Postscript in *Zubulake v. UBS Warburg LLC*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004), "[t]he subject of the discovery of electronically stored information is rapidly evolving. . . . [T]wo years ago, there was little guidance from the judiciary, bar associations or the academy as to the governing standards. Much has changed in that time. There have been a flood of recent opinions – including a number from appellate courts – and there are now several treatises on the subject." *Id.* at *15. This guidance, while welcome, is not enough. For PM USA, the biggest challenge is determining the most efficient and effective way to manage the large volume of electronically stored information generated within the Company consistent with all of its legal obligations.

PM USA is committed to remaining at the forefront of corporations in adopting best practices to manage electronically stored information. PM USA, like all other organizations that generate a large volume of electronically stored information, needs consistent and predictable rules with regard to electronic discovery. The Proposed Rules begin to provide large data producers the guidance they need in order to ensure that they are implementing the best technologies, systems and procedures to comply with all of their legal obligations. The absence

of such guidance imposes tremendous costs on organizations dealing with complex information systems and large amounts of electronic information.

PM USA appreciates the opportunity to share its views with the Committee on the Proposed Rules. The Company has been following these proceedings with great interest, as well as carefully reviewing the Committee's work product and most of the written comments, as well as monitoring the prior two public hearings. We agree with many of the comments already submitted by corporate counsel organizations and corporate counsel, particularly those submitted by Microsoft and Intel.

PM USA brings a perspective to these rules that differs from many other litigants. Like many corporations, PM USA has a large volume of electronically stored information that is challenging to manage. Similar to a smaller, but significant, number of corporations, PM USA is a frequent party to repetitive lawsuits that present similar claims and factual situations. For PM USA, differing or vague standards regarding the preservation and production of electronically stored information can be extremely expensive and disruptive, and make the task of determining the best practices to manage that information an enormously difficult one.

These comments focus on three main points:

- Amendments to the Rules are necessary. It is insufficient to rely on a burden analysis under Rule 26(b)(2), case law or local rules to provide organizations the guidance they need to develop and implement efficient and effective information management systems that fully comply with their preservation and production obligations. (Section II *infra.*)

- Certain of the Proposed Rules may increase the risk that litigants will request, and courts may enter, vague blanket preservation orders directing parties to suspend all routine maintenance and backup programs. Such orders can create unintended consequences and may provide one litigant with an unfair advantage. The Proposed Rules should be clarified to prevent this consequence. (Section III *infra.*)

- Proposed Rule 34 addressing the form of production could be misconstrued to provide a presumption in favor of the requesting party's preferred form, and it is critical for companies producing the same information in multiple cases to be able produce that information in consistent formats across cases. In addition, language in the Proposed Rule may indicate a preference for production in native format, which is impractical and typically unnecessary. (Section IV *infra.*)

## I. BACKGROUND

PM USA, like most large organizations, has an enormous volume of electronically stored information with almost a thousand different servers that house information from a multitude of different applications – e-mail, various documents systems, large dynamic databases and enterprise-wide relational databases – all of which amounts to many terabytes of electronically stored data. As the volume of electronically stored information maintained by organizations such as PM USA has increased, there has been an exponential increase in the volume of information that is being requested in discovery, particularly because there is little cost to the requesting party associated with seeking an infinite amount of information. As Judge Michael A. Baylson stated in his comments to the Committee:

> Just as electronic discovery has increased the size of the producible universe of information, it has also increased the appetite of many litigants – such that huge burdens and expense can be placed on the producing party to ascertain the existence of, and produce, in electronic format, a much greater volume of documents than most lawyers or litigants would consider appropriate in cases with no electronically stored information. Stated differently, I believe that courts are now more tolerant of large-scale productions of material in electronic format, which, if in hard copy would have been considered "unduly burdensome" (to use a famously overworked phrase).

The pending lawsuit by the Department of Justice ("DOJ") against the tobacco industry underscores the voluminous discovery requests that large organizational litigants now face. DOJ had access to a public website containing over 3 million documents (or over 12 million pages) that PM USA had produced in prior product liability cases. In addition, PM USA and its

affiliated corporations made available to the government almost 7.5 million additional documents. The other industry defendants similarly produced large volumes of documents. The United States itself made approximately 76.5 million documents available to the defendants. It is notable that during extensive deposition discovery, less than 6,000 (or something substantially less than one hundredth of one percent) of those documents were marked as exhibits.

The challenges and issues that PM USA faces in addressing the substantial increase in size of the searchable universe of information are no different than those faced by most other large organizations involved in litigation today. Some of those challenges and issues, however, are magnified for PM USA given the volume of lawsuits that have been filed against the Company. PM USA is currently involved as both a defendant and a plaintiff in over 2,000 lawsuits, including both individual product liability cases and over 40 separate class action and other complex litigation matters (*e.g.*, health care cost recovery actions, consumer class action complaints, antitrust matters, foreign government contraband complaints, and contribution actions by asbestos manufacturers).

Because of this steady volume of litigation, the Company has long had a documented, substantive records management program and litigation hold procedures. Since the early 1990s, PM USA has, in essence, been operating under a continuous "litigation hold" on a number of far ranging topics. For almost fifteen years, PM USA has been regularly collecting and producing documents from key departments within the organization. In recent years, however, the increasing volume of electronic mail and other forms of electronically stored information has presented new issues and challenges relating to collecting, processing and reviewing information.

The Company is continuously exploring and analyzing the available technology and best practices for addressing electronic discovery. The Company has implemented a number of proactive, innovative processes to deal with the high volume of electronic information requested in litigation, and the frequency with which it must produce the same or similar information in multiple litigations. We provide this information to illustrate what we believe is a trend among large data producers – an attempt, in the absence of clear guidelines, to make electronic discovery more cost effective, easier and more comprehensive.

1. PM USA has streamlined the process of providing discovery to plaintiffs in product liability cases by posting documents produced in prior product liability cases on two searchable websites. The first website is a public website that presently includes over 3 million non-privileged, non-confidential documents produced in prior product liability cases.[1] No permissions are required for access to this website. The second is a private website requiring permissions for access and containing confidential, non-privileged documents that were produced in prior product liability cases subject to a protective order.[2] The documents located on this website are document images in TIFF format, and can be searched through bibliographic and other coding. A plaintiff who has filed a product liability case against the Company can obtain access to this website at no cost. Presently, through the private website, a plaintiff can

---

[1] The Company's public website was created on February 27, 1998, when PM USA voluntarily began posting documents in response to extensive discovery requests in certain state health cost recovery actions on www.pmdocs.com. Later that same year, the settlement of these actions resulted in an agreement known as the Master Settlement Agreement ("MSA"), which requires PM USA to maintain a searchable website containing documents produced by the Company in civil litigation concerning smoking and health. Pursuant to the MSA, PM USA implemented certain enhancements to its website, such as improved navigational and search features. The site currently provides search capabilities of up to 32 fields of coded bibliographic information, such as "author," "date," "title," and "persons/entities/brands mentioned."

[2] The Company periodically reviews documents it has produced subject to a protective order to determine whether they can be "de-classified" and posted on the public website.

access approximately 3.4 million documents and over 14 million pages (*i.e.*, the documents available on the public website plus almost 400,000 additional documents).

2. With the increased use of electronically stored information, PM USA began designing custom software in 2002 that would work with its Microsoft Outlook e-mail system. The software was completed and rolled out throughout the Company in 2003. When receiving or transmitting e-mail and attachments, users are prompted by this custom software to send a copy of any items subject to a litigation hold to a separate secure data vault. The same system permits users to send other electronic documents – for example, Word documents, spreadsheets and PowerPoint presentations – to the same "litigation hold" archive by simply clicking on the document and dragging it to a special folder on their desktops. The development and implementation of this system has cost the Company approximately $4 million.

3. The Company is also in the initial stages of a three-year project to design and implement a new company-wide enhanced electronic document management system that would efficiently house and actively manage the Company's electronic documents. Rather than multiple copies and versions of documents being retained in individual users' computer folders and e-mail programs, implementation of such a system will require that more documents be saved in specified, managed locations pursuant to particular conventions. With such a system, locating electronic documents will not depend on the filing systems of individual users; it will largely be possible to search a single document management system. While no firm costs estimates yet exist, the effort and expense required for such an endeavor are significant. Further, this is a very ambitious undertaking and success is not assured.

4. Two and one-half years ago, as the volume of documents requested in litigation continued to grow, the Company determined that it would be more effective and more efficient

to develop an internal infrastructure to accomplish the collection, review and production of documents. For these and other reasons, PM USA's Law Department formed a new group to handle, among other things, document and electronic information discovery in the Company's product liability and commercial cases. This group started with only a few employees and now consists of 58 staff members, including attorneys, managers, paralegals and other support personnel.[3]

While PM USA is addressing internally many of the challenges and issues that electronic discovery present, the toughest issue for the Company is finding the most effective and efficient way to manage electronic information in the absence of clear guidelines regarding its preservation and production obligations. The proposed amendments to the Federal Rules – in particular, the two-tiered approach in proposed Rule 26(b)(2) and the "safe harbor" in proposed Rule 37 – begin to provide litigants with some bright line rules that help establish reliable guidelines for compliance with preservation and production obligations.

## II. AMENDMENTS TO THE FEDERAL RULES ARE NECESSARY

In order "to secure the just, speedy, and inexpensive determination of every action" (Fed. R. Civ. P. 1), new rules are needed. Some parties who have provided comments in response to the proposed amendments have said the Proposed Federal Rules are not needed. These commentators have argued: "We don't really need new rules, because all of the issues surrounding the discovery of electronically stored information can simply be handled under a 'burden' analysis with Rule 26(b)(2)." It is neither sufficient, nor prudent, to leave those issues to a "burden" analysis under Rule 26(b)(2) for a number of reasons.

---

[3] One of the group's attorneys is a member of the Sedona Conference Working Group on Electronic Discovery.

*First*, the emerging reported case law on electronic discovery does not provide litigants with clear and consistent guidance concerning their production obligations. For example, the cases addressing whether information on backup tapes must be preserved, restored and produced run the gamut. On one end of the spectrum, there is case law standing for the proposition that the production of backup tapes is a cost of doing business in the computer age. *See, e.g., In re Brand Name Prescription Drugs*, 1995 WL 360526, at *3 (N.D. Ill. June 15, 1995). There are also cases suggesting that a "test run" should be performed on a sample of backup tapes before a determination is made as to whether a larger number of backup tapes should be restored. *See, e.g., McPeek v. Ashcroft*, 202 F.R.D. 31, 35 (D.D.C. 2001). At the other end of the spectrum, there are recent decisions such as Judge Scheindlin's decision in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003), holding that "[a]s a general rule, [a] 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." *Id.* at 218. The general rule set forth by Judge Scheindlin in *Zubulake* is consistent with the proposed amendments to the Rules, as well as *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production.*

In the absence of a clear national standard on this and other issues relating to the discovery of electronically stored information, large data producers will be confronted with a Hobson's choice. They can recycle backup tapes, retire obsolete databases or continue e-mail maintenance programs in accord with one line of cases, but run the risk that a court following a different line of cases will conclude that the burden of buying and storing more tapes, migrating unneeded historical data and dealing with e-mail volume problems are simply "a cost of doing business" and sanction the company for failing to preserve data. Alternatively, companies can

always take the more conservative approach, but the cost of doing so indefinitely is prohibitively expensive. For example, according to PM USA's Information Technology Department, it would cost the Company almost two million dollars a year just to purchase a steady supply of new backup tapes for its current e-mail system. That estimate does not include either the costs of backup tapes for all of the Company's other data systems or the cost of storing such a massive number of tapes.

*Second,* the absence of a uniform national standard will result in a patchwork of local rules embodying different and sometimes conflicting standards. This has already begun. Federal district courts in Delaware, Kansas, New Jersey, Wyoming and Arkansas have already issued local rules addressing some aspects of electronic discovery, and proposed local rules are under consideration for federal district courts in the Ninth Circuit.[4] These local rules were promulgated because district court judges, magistrate judges and attorneys all recognize a need for uniformity and consistency from case to case. It is fair to conclude that more jurisdictions are considering local rules that address electronic discovery, but are waiting for the final recommendation of the Committee before deciding how to proceed.

If each court is left to develop its own standard, a large national company facing repetitive litigation in multiple jurisdictions will likely have to comply with differing standards depending on where a case has been filed. Worse, for planning purposes a proactive company will not know what standard will eventually apply. A patchwork of different and conflicting standards will have undesirable effects inconsistent with the mandate of the rules. For example, while PM USA has been able to streamline discovery in product liability cases by offering its

---

[4] In addition, a number of states, including California, Illinois, Mississippi and Texas, have enacted rules addressing electronic discovery. While the Committee's recommendations will have no direct effect on state rules, they will likely have an indirect effect since the rules in many states are patterned after the federal rules.

web-based repositories, conflicting rules and standards could preclude production in that format. What may be encouraged, or even required, in one jurisdiction, may be prohibited in another, to the detriment of Rule 1's guiding principles.

*Third,* while the Federal Rules of Civil Procedure do not address preservation obligations directly, they nonetheless have a profound effect on how litigants determine what it is they are obligated to preserve. By specifying what is, and is not, presumptively discoverable, the Rules will have a direct impact on – and provide guidance to litigants in developing – proper, yet efficient, information management systems.

*Fourth,* PM USA is unaware of a technological solution that totally eliminates the burden and cost issues associated with reviewing large quantities of electronic information for privilege and confidentiality. While the Committee has acknowledged that undue costs can be associated with restoring inaccessible electronically stored information, these costs often pale in comparison to the costs associated with reviewing that information for privilege and confidentiality. PM USA's own experience is consistent with *Medtronic Sofamor Danek, Inc. v. Michelson*, 2003 WL 21468573, *7-8 (W.D. Tenn. May 13, 2003), where the court noted that the "cost of restoring, de-duplicating, and designing and conducting a search of all 996 backup tapes could be in the range of several million," but the producing party's "estimates of privilege review costs range[d] between $16.5 million and $70 million." And, while the largest organizations that frequently participate in litigation are better able to justify the expense and burden of researching and implementing the latest litigation technologies, smaller or less successful companies may have much more urgent priorities for their available funds. The Federal Rules, however, must apply to all.

In sum, new rules are needed to address the unique issues of volume and burden that are present in an electronic world, which were not present in a paper world. The case law on "burden" will never provide the certainty companies must have to develop and institute compliant systems and to justify the expense of new technology. An absence of federal rules will result in local jurisdictions and states acting unilaterally to fill the void with inconsistent standards; whereas Federal Rules that clearly address the presumptive limits of appropriate e-discovery will allow companies to better gauge their obligations. The volume of electronically stored data that must be reviewed will always be huge and will continue to increase, despite developing search or categorization tools. The pressing need for predictability and consistency cannot be delayed in the hope that technology will someday solve all of the problems it has created. Better guidelines are needed for both those organizations willing to be in the vanguard of technological innovation with respect to litigation technologies and for those litigants that, for whatever reason, are not.

## III. THE PROPOSED RULES MAY INCREASE THE LIKELIHOOD THAT COURTS WILL ENTER BLANKET PRESERVATION ORDERS AT THE OUTSET OF LITIGATION

PM USA accepts that, on rare occasions and after due consideration by the court of all the facts, it is appropriate to enter a specific preservation order to address those issues the parties are unable to resolve after a full and candid exchange of information and viewpoints. But the Proposed Rules may have the unintended consequence of increasing the risk that courts will enter overbroad preservation orders at the outset of litigation, requiring litigants to preserve all information that may be potentially relevant in the litigation. Several rules, when read together, increase this likelihood:

- Proposed Rule 26(f) encourages early discussion of – and hopefully agreement on – preservation issues. Those discussions will rarely be completed until 90 to120 days after the commencement of litigation.

- The proposed amendments to the Rules, particularly the two-tiered approach in proposed Rule 26(b)(2), will typically require a requesting party to examine accessible electronically stored information before requesting inaccessible electronically stored information. The requesting party will therefore likely argue that all inaccessible electronically stored information should be preserved until it has had an opportunity to review the accessible information.

- The proposed "safe harbor" in Rule 37 permits a party to continue routine computer maintenance and backup programs *in the absence of a court order* suspending or modifying such programs.

PM USA strongly supports all of these rules and wishes to see them adopted. However, taken as a whole, these provisions may increase the likelihood that requesting parties will seek broad or blanket preservation orders directing producing parties to suspend all routine maintenance and backup programs "just to be safe." In receiving a request for a broad or blanket preservation order suspending a company's disaster recovery system and routine maintenance computer programs, a U.S. District Court examines the effect of such an order only in the case in which it was requested and therefore may conclude that there is no harm to entering a blanket preservation order for three to six months. But such orders present the worst-case scenario for a large organization that is subject to high volume and repetitive litigation.

If a company is subject to broad preservation orders in multiple litigations, it may effectively be precluded from ever operating routine maintenance programs or recycling backup tapes. This was referred to in the Dallas hearings as the "serial preservation" problem. By way of example, a purportedly "narrow" preservation order in a company's first case may require the preservation of all then-existing backup tapes. Before issues relating to whether inaccessible information in the first case must be restored and searched for potentially discoverable information, however, the company might receive a second "narrow" preservation order in

another case requiring it to preserve all existing backup tapes. While the first order did not apply to backup tapes on an ongoing basis, the second order sweeps in materials subject to prior preservation orders and also extends to the most current data. Each successive order compounds the extremely duplicative retention of more and more data.

The costs that can be imposed on a company as a result of an overbroad preservation order or the costs of a company taking a conservative approach to its discovery obligations due to the absence of clear rules can be extraordinary. Since April 2002, PM USA has suspended its automated e-mail maintenance programs. As a result, the Company has had to increase the size of its e-mail server system fourfold to accommodate an e-mail environment growing at a rate of 6 gigabytes each business day or approximately 132 gigabytes per month. PM USA has spent more than $5.6 million simply trying to manage the growth of its e-mail system and to ameliorate any risk to the system associated with adding more servers. As noted, it has also spent $4 million in additional expenses developing and implementing the custom software and "litigation hold" archive to safeguard a copy of all e-mail required for litigation purposes in a secure vault separate from the Company's growing e-mail system. Since PM USA cannot simply continue to add more servers due to operational limitations and the specific architecture of Microsoft's Exchange 5.5 system, the Company is now exploring different technologies and strategies that would allow it to better manage e-mail.

Given such burdens, the serial preservation problem can best be ameliorated by giving organizations clear and consistent guidance on their production obligations, so they can design and implement systems and procedures that will serve their business needs and, at the same time, ensure compliance with their legal obligations. When a company's production obligations are clear, preservation orders are seldom warranted. While the Rules cannot define a company's

common law preservation obligations, presumptive limits on discovery – such as the two-tiered approach in proposed Rule 26(b)(2) – provide tangible guidance to corporate litigants.[5]

In addition, broad preservation orders would be less likely if the "safe harbor" were not dependent on the absence of a preservation order. The rule should provide that a court may not impose sanctions on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party acted culpably in violating a narrowly drawn preservation order requiring the retention of specified information.

Even in the rare cases where preservation orders are necessary, the Committee's Notes should emphasize that blanket preservation orders should be discouraged. Preservation orders should be issued only upon a showing of necessity and, if such a showing is made, any preservation order should set forth with specificity the electronic information that is to be preserved and the technical means to be utilized to preserve that information. As the *Sedona Principles*, Comment 5.f recommends:

> [C]ourts should not issue a preservation order unless the party requesting such an order demonstrates at a hearing the necessity of such an order. Because all litigants are obligated to preserve relevant documents in their possession, custody or control, a party seeking a preservation order must first demonstrate a real danger of document destruction, the lack of any other available remedy, and that a preservation order is an appropriate exercise of the court's discretion.

---

[5] The Notes can also go a long way to better defining a company's general production and preservation obligations, such as the existing observations that "in most instances a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order" and that "in some instances reasonable care may require preservation of electronically stored information that is not reasonably accessible if the party knew or should have known that it was discoverable in the action and could not be obtained elsewhere."

## IV. THE PROPOSED RULE ADDRESSING THE FORM OF PRODUCTION SHOULD BE CLARIFIED

Proposed Rule 34(b) provides, *inter alia*, that the requesting party "may specify the form in which electronically stored information is to be produced." PM USA is concerned that the intent of the rule may be misunderstood. Based on PM USA's attendance at the San Francisco hearing, and the comments of Committee members during that hearing, it appears that the intent underlying the proposed rule is that parties must agree on the format of production and, if there is a dispute between the parties concerning the format, the court must resolve the dispute. But, because the provision begins with the statement "[t]he request may specify the form in which electronically stored information is to be produced," some requesting parties, as well as some courts, may misinterpret the provision as creating a presumption in favor of the requesting party's preferred form. The rules must be clear so as to avoid either unintended consequences or providing one party an unfair advantage in litigation.

It is critical for companies such as PM USA, which have to produce the same information in multiple litigations, to be able to produce the same documents in consistent formats across cases in order to meet their obligations in a timely and efficient manner. As explained above, for documents repeatedly requested in product liability cases, PM USA currently makes those documents available to plaintiffs through a web-based repository. Making these documents available to plaintiffs in this format streamlines discovery by eliminating duplication in the production process for PM USA; it also allows plaintiffs to gain access to searchable documents on a more expedited basis. If the formats requested by plaintiffs were given deference, responding to discovery requests in each of the product liability suits that PM USA is defending at any one time could become unmanageable.

In addition, where the requesting party does not specify the form in which electronically stored information is to be produced, proposed Rule 34(b) provides that the responding party "must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form." The phrase "a form in which it is ordinarily maintained" suggests that electronic information should be produced in native format. The production of electronic information in native format in a litigation context is problematic for a number of reasons:

*First,* the pages of a document in "native" format cannot be labeled with "Bates" numbers or confidentiality designations.

*Second,* it is often necessary to redact portions of a document (*i.e.,* a sentence of a document summarizing legal advice), but it is not possible to redact documents in native format.

*Third,* it is easier to alter documents produced in native format than those produced in other formats. While native format documents can be authenticated through an involved technical procedure called "hashing," it is not possible to authenticate a hard copy printout of a document produced in native format, the copy a party is likely to use in a deposition or at trial.

*Fourth,* the purported advantage of native format production – the availability of metadata – is rarely needed in most cases. As the Manual for Complex Litigation, § 11.466 (4th ed.) cautions: "More expensive forms of production, such as the production of word-processing files with all associated metadata . . . should be conditioned upon a showing of need or sharing of expenses."[6] Production in native format, with associated metadata, would unnecessarily require significant additional privilege and confidentiality review of each document's metadata before

[6] Metadata can be unreliable. For example, in creating a PowerPoint presentation, one often deletes all content from a presentation prepared by someone else but uses the borders and graphics of the earlier presentation as a template. In that circumstance, the "date created" and "author" fields may be carried over from the original PowerPoint document.

native format documents could be produced, thereby causing significant additional expense and delaying production.

Proposed Rule 26(f)(3) already requires, as it should, that the parties meet and confer regarding the form in which electronically stored information should be produced. During this process, it would be entirely appropriate for the requesting party to specify any preferences it has concerning the form of production. PM USA suggests that the intent of proposed Rule 34(b) would be clearer if it deleted the language stating that "[t]he request may specify the form in which electronically stored information is to be produced." Such a deletion would not prevent the requesting party from specifying a preference for a particular form during the Rule 26(f) conference; however, it would ensure that the form preferred by the requesting party would not be given undue weight by a court should a dispute arise between the parties over the form of production. For the reasons described above, PM USA also recommends that any stated preference in the rule for producing electronically stored information "in a form in which it is ordinarily maintained" should be deleted as well.

Thus, the proposed Rule might be modified to provide:

> Unless the parties otherwise agree, or the court otherwise orders, a party producing electronically stored information shall produce the information in a form that is reasonably useful. The party shall be required to produce such information to the requesting party in only one form.

In addition, PM USA believes that it would be valuable, both for litigants and courts, for the Committee briefly to address native format production and metadata in its comments to Rule 34(b) and in particular to provide the following clarification:

> Nothing in these Rules is meant to require the routine production of electronic documents in "native format" or the routine production of "metadata," which should generally be ordered only upon a particularized showing of need or a sharing of expenses.

## V. A BRIEF RESPONSE TO THE COMMENTS SUBMITTED BY ARMA

ARMA International, an association of records managers and administrators, submitted comments on January 14, 2005, and the Company would like to briefly respond to suggestions contained in those comments.

*First,* ARMA suggests that the Committee add the following language to the Proposed Rules or the Committee Notes: "Records subject to a party's record retention policies and procedures, whether formal or informal, will be assumed to be reasonably accessible . . . ." This proposed language is overbroad and susceptible to misinterpretation.

To records management specialists, the term "record" has a narrower meaning than it does to the average layperson or judge. A "record" is generally considered to be an official company document that memorializes business activity, such as weekly production figures or a public company's year-end audited financial statement. All company "records" have a retention period (*i.e.,* 3, 7, or 10 years) after which the record is to be destroyed. The term "record" generally reflects a small subset of the information considered discoverable under the Federal Rules of Civil Procedure. The use of the term "record" in ARMA's proposal is likely to lead to confusion and misinterpretation.

PM USA's records management policy is designed, like many companies, to include a litigation hold over all of the Company's documents that might be required in anticipated litigation. These litigation holds apply to documents without regard to whether they are considered formal records and, in some circumstances, such litigation holds extend to backup tapes and legacy data. To assume all documents "subject to a [company's] record retention policies and procedures" are accessible, as ARMA advocates, would lead to overbroad and unreasonable results.

*Second,* ARMA suggests that "[l]egacy data can be considered reasonably accessible during its entire retention period, whether it is in active use or being retained to meet legal or regulatory requirements and regardless of the format or technology used for storage."

It is one thing to say that documents being retained for a specific business purpose for a specified retention period usually should be kept in an accessible format as a matter of good business practice.[7] But, it is not at all clear that this Committee should convert that general "best practice" into a rule of law for all companies in all circumstances.

In addition, if ARMA's "being retained to meet legal . . . requirements" standard were interpreted to include the retention of documents pursuant to a company's common law preservation obligations or a preservation order, then ARMA's suggested rule would create a startling new legal burden: a party would be required to continuously convert archived legacy data into more modern, up-to-date formats for the duration of its preservation obligation on the off chance that some party might request its production. (For PM USA, a large portion of its historical data has been under a continuing preservation obligation since the early 1990s.)

Perhaps much of the confusion arises from ARMA's use of the term "record" in a narrow sense, but it nonetheless highlights the extreme caution that the Committee should exercise with respect to ARMA's suggestions concerning accessibility.

* * *

In finalizing the proposed amendments to the Rules, we hope that the Committee will particularly focus on the following issues:

- Consistency and clarity relating to an organization's production and preservation obligations will encourage organizations to undertake the effort and expense associated with implementing new and better technologies and procedures for

[7] It is not at all clear that ARMA's recommended "best practice" is by any means an "industry standard" today, although its own comment would suggest it is not.

managing their information and result in more efficient and effective management of information. The Proposed Rules are a welcome first step in that direction.

- Aspects of the Proposed Rules are likely to cause requesting parties to seek vague blanket preservation orders directing parties to suspend all routine maintenance and backup programs "just to be safe." Accordingly, the Notes should strongly discourage the entry of such preservation orders and stress the need for specificity as to the data to be preserved and the operations, if any, that are to be suspended. In addition, the "safe harbor" should provide that a court may not impose sanctions on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party acted culpably in violating a narrowly drawn preservation order requiring the retention of specified information.

- As proposed Rule 34(b) is currently drafted, it could be misconstrued to provide a presumption in favor of the requesting party's preferred form. It is critical for companies such as PM USA, which have to produce the same information in multiple cases, to be able to produce that information in a consistent format across cases. In addition, the language in proposed Rule 34(b), providing a preference for production in "a form in which it is ordinarily maintained," should be deleted and the Committee Notes should provide that production in "native format" should rarely be a first option.