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E-DISCOVERY-RELATED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE

For years now, attorneys, business people, and courts alike have struggled with the electronic data revolution. As a result of fundamental changes in the way companies do business, such as the generation of millions of pages of e-mail on a daily basis, as well as the migration of standard business record-keeping to "paperless environments," companies have tried to reconcile traditional notions of record retention and production obligations with the task of retaining and locating all of the ephemeral data created electronically—a virtual impossibility for messages generated in a typical business day, let alone year after year.

In addition to the astronomical increase in the sheer volume of business documents resulting from technological innovations,[1] companies must adapt to new forms of communication (such as instant messaging) while also adapting to new and sometimes conflicting case law interpreting the responsibility to retain and produce these new forms of information.

The challenges of electronic discovery are also a product of the technology itself. Without a clear grasp of how a given system works, it is extremely easy to inadvertently destroy metadata or automatically delete files simply by turning on a system that was preprogrammed to perform such housekeeping functions.[2] If an opponent subsequently seeks production of that data, the evidence will have disappeared and the client is at risk of sanctions. Given the huge amounts

1. *See* Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure, p. 22 (Sept. 2005), available at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf. The Committee noted in its report, "Electronically stored information is characterized by exponentially greater volume than hard-copy documents. Commonly cited current examples of such volume include the capacity of large organizations' computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and to receive 250 to 300 million e-mail messages monthly."
2. Summary of the Report of the Judicial Conference, *supra* note 1, p. 23 ("Computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores. Computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge.").

of data that can fit on a single CD or tape, the failure to suspend routine document-destruction cycles or backup recycling rotation can result in the loss of hundreds of thousands, if not millions, of relevant pages of material.

On the other end of the spectrum, some attorneys have used the production of electronic data as a means for gaining a tactical advantage in litigation by either creating discovery "sideshows" or "dumping documents" on opponents. Parties producing large volumes of records, with the full knowledge that the bulk of such productions are nonresponsive, can overwhelm opponents and hide a needle in a very large electronic haystack.

In recent years, organizations such as The Sedona Conference,[3] as well as the courts through the implementation of local rules,[4] have provided guidelines for how companies should approach their litigation obligations despite the ever-changing types and ever-growing volume of electronic data.

On December 1, 2006, provided that no congressional activity occurs in the interim, a greater degree of uniformity and consistency will be brought to these issues, as revisions to the Federal Rules of Civil Procedure go into effect to address electronic discovery issues.[5] The proposed changes will require companies and counsel alike to consider, discuss, and resolve electronic discovery issues during the prediscovery and early discovery periods.

Despite the December effective date, companies must familiarize themselves with the new rules immediately. First, the rule changes largely codify already existing case law; as a practical matter, many of the obligations imposed under the new rules are already expected of litigants in U.S. courts. Second, many companies may find they have months of internal work to do to be able to comply with the detailed attention that will be given to these issues at the outset of litigation under the new rules.

While the new federal rules will most immediately impact companies that are involved in active or imminent litigation, even companies that are not actively litigating would be wise to adapt their retention protocols to ensure that they will be ready and able to comply with new discovery obligations in rapid-fire fashion at the appropriate time. Particularly because these changes do not signal any major substantive shift in the governing law, compliance with these obligations is imperative and may well save valuable time and money once litigation commences.

The proposed rule changes relating to electronic discovery specifically affect Rules 16, 26, 33, 34, 37, and 45 and Form 35.[6] These changes reflect seven main principles:

- Specific reference to electronic media.
- Mandated early focus on discovery plans.
- Addressing privilege considerations at an early stage.
- Accessibility as a factor in production responsibilities.
- Specified formats for production.
- Potential availability of a safe harbor for honest mistakes.
- Parallel revisions to subpoena obligations.

SPECIFIC REFERENCE TO ELECTRONIC MEDIA

The current rules lack specific focus on electronic discovery as it differs from paper discovery. The proposed rules address this through the introduction of a new term, "electronically stored information" (or "ESI"), which is defined as "including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium. …"[7] Throughout the new rules, this term is used to identify specific attention to these

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3. *See, e.g.,* The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information and Records in the Electronic Age (2004); The Sedona Principles: Best Practice Recommendations & Principles for Addressing Electronic Document Production (2004).
4. For example, the Middle District of Pennsylvania, the District of Wyoming, and the Eastern and Western Districts of Arkansas recently enacted local rules to address electronic discovery issues. A number of other jurisdictions have also implemented local rules. *See* the Federal Judicial Center home page, www.fjc.gov, for a complete list.
5. The full text of the amended rules and associated commentary is available at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf. *See also* the appendix to this *Commentary*, which outlines the proposed changes.
6. The e-discovery changes have been under consideration since at least 1996, when the advisory committee first received comments about problems related to computer-based discovery. For more details on the procedural history of consideration of these rule changes, *see* Summary of the Report of the Judicial Conference, *supra* note 1, p. 22 and following.
7. Proposed Fed. R. Civ. P. 34(a).

precise issues, as well as special considerations (discussed in greater detail below) that may apply if the information is maintained in electronic form.

The introduction of this term, however, should not be misinterpreted to mean that existing case law applicable to "documents" is inapplicable to ESI. To the contrary, the rules employ the term to spotlight electronic data in specified situations but do not exclude electronic data from already existing obligations (such as preservation obligations) with respect to responsive information generally.

Revised Rule 33 incorporates electronically stored information as a possible source to cite in response to an interrogatory request. Further, Rule 34 provides expressly that the scope of production of documents will include electronically stored information.

MANDATED EARLY FOCUS

The most notable aspect of the new rules is that they will require counsel and companies to address electronic production issues explicitly and early, both to avoid the loss of relevant information and to ensure production in usable formats.

For example, proposed Rule 26(f) provides that parties must confer "to discuss any issues relating to preserving discoverable information" prior to the Rule 16 scheduling conference. Further, parties are required to discuss "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced" pursuant to proposed Rule 26(f).

Proposed Rules 16(b)(5) and (b)(6) provide that the scheduling order may include "provisions for disclosure or discovery of electronically stored information" and "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production."

Form 35 memorializes some of these changes by identifying electronic-discovery-related topics as subparagraphs in the form discovery plan.

Thus, producing parties will need to come to the table familiar with their clients' information and prepared to address steps taken or contemplated to preserve and produce information. If the parties don't raise the issue, the court may well do so on its own initiative. The explicit requirement that ESI be expressly addressed by the parties at the inception of litigation brings to a final close the era of "mutually assured destruction" in which the parties could mutually choose to tacitly ignore electronic data issues. The concern underlying the new rules is that failure to address issues early and openly not only presented a trap for the unwary but did a disservice to the interest of justice in an era in which electronic data is of ever-growing significance to the merits of the case. Consequently, even if your opponent isn't asking the tough questions, the court may.

This is not to say that the court will reject parties' knowing decisions with respect to ESI (including potential agreements to exclude it from discovery or limit its scope). However, the new rules make it increasingly unlikely that no one will raise the issue in the first instance, and parties must therefore plan to engage in the virtually inevitable discussion of the matter.

To be prepared to meet the obligations set forth in these new rules, prior to attending the Rule 16 conference or negotiating the discovery plan reflected in the Rule 26(f) report, counsel must become familiar with the technical aspects of a client's operations, including but not limited to identification of computer systems currently used as well as legacy systems in use during the relevant period; availability of IT staff to explain and access these systems; identification of IT personnel responsible for working with counsel; possible forms of production of electronic data; operation of backup and routine destruction systems; use of sampling to locate the data; and estimates of the costs of identification, retrieval, and production.

In addition to logistics, counsel must understand early on the substantive contents of a client's systems. The specific location(s) of the data of "key players," the relevance of metadata to the particular claim(s) at hand, the motivation or demonstrated propensity of key players to delete or modify data, and the relative importance of the specific pieces of informa-

tion to the issues in the case all are relevant considerations for the cost/burden assessments underlying the proposed rules.[8]

Notably, all of this knowledge is required to implement hold notices and satisfy preservation obligations. In some cases, these obligations may predate the actual filing of litigation.

In short, clients must understand that preparation for these very early preservation obligations, hearings, and conferences may be extensive and time-consuming. The consequences of insufficient early attention to these issues may be drastic, whether through unwittingly agreeing to an exorbitantly expensive production protocol, accepting responsibility for searches that are unnecessary and expensive, or later being sanctioned for not having addressed these issues adequately. The preliminary hearings are the primary fora for avoiding these pitfalls and thus will take on greater importance under the new rules.

ADDRESSING PRIVILEGE CONSIDERATIONS AT AN EARLY STAGE

The huge volume of electronic data also presents significant challenges when addressing issues of privilege and trade secrets. It is not practically possible for courts to afford litigants the time required to conduct a traditional page-by-page privilege or confidentiality review when the volume runs to millions of pages, as is easily the case with electronic data. Furthermore, because of the mammoth size of electronic productions, inadvertent production of privilege materials has become a particularly important issue in the context of electronic discovery. Simply put, because a thorough, considered page-by-page review of materials to identify privilege is next to impossible given the volume of potentially responsive electronic documents, the likelihood of privileged communication slipping through whatever process is applied is much greater than in the days of purely paper productions.

Proposed Rules 16 and 26 are both designed to address these issues, again through early intervention. Rule 16 provides that "any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production" may be included in the scheduling order. This provision speaks to what is traditionally known as "clawback" arrangements, whereby parties agree to return to one another privileged materials inadvertently produced. The proposed rule invites parties to include such provisions into the Rule 16 scheduling order.

Thus, the parties can incorporate clawback provisions or sneak peek/quick peek provisions[9] into the scheduling order and have such agreements receive the stamp of judicial approval for purposes of the litigation. By having a court implement such provisions in an order, the parties can avoid subsequent squabbling over whether a specific instance of inadvertent disclosure constitutes a waiver.

Rule 26(b)(5)(B) sets forth a specific procedure to be followed in the event of inadvertent production:

> If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.[10]

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8. *See* Manual for Complex Litigation (4th), § 40.25 (2), for a more complete listing of considerations.
9. These provisions can be drafted to allow for the immediate return of inadvertently disclosed documents without waiver of the attorney-client or work product privileges. However, certain jurisdictions do not recognize these agreements as binding, so careful consultation with the precedent in the implicated jurisdiction is required. Though these provisions come in a variety of forms, their purpose is to ensure that parties will return inadvertently disclosed materials.
10. *Compare* ABA Formal Op. 05-437 (Oct. 1, 2005) (no longer is a receiving attorney mandated to return inadvertently disclosed privileged materials). *See also Hopson v. Mayor and City Council of Baltimore*, Civ. A. No. AMD-04-3842 (D. Md. Nov. 22, 2005) (discussion of privilege issues in large-scale electronic document review and production). *See also* proposed revision to Fed. R. Evid. 502.

Although this provision attempts to provide some measure of protection of the privilege against inadvertent waiver, many commentators have suggested that this rule gives producing parties a false sense of security. The provision really does nothing more than preserve the issue until the court has had an opportunity to rule on the waiver-of-privilege issue, a substantive decision the rules leave to the common law of each jurisdiction.

Moreover, neither the Rule 16 mechanism allowing for incorporation of agreements in court orders nor the Rule 26 procedure for handling of materials pending resolution of disputes is binding on third parties who are strangers to the litigation. Such third parties, who may receive inadvertently produced materials as easily as someone can forward an e-mail, are not bound by agreements or orders and may be free in some jurisdictions to assert waiver despite parties' agreements or court orders to the contrary.

The best advice, therefore, is to not rely on these provisions alone. Rather, individual companies can take steps to reduce the likelihood that privileged materials are commingled with general electronic business documents by using segregated servers for legal-personnel electronic data or by creating a policy that minimizes the use of electronic communication systems by in-house legal personnel or establishes a labeling protocol for such documents that makes them easily identifiable by electronic search engines. Again, internal planning in advance of litigation is the key to success.

ACCESSIBILITY AS A FACTOR IN PRODUCTION RESPONSIBILITIES

The courts have not been blind to the staggering volume of electronically created and stored data.[11] However, electronic data is not problematic simply because of its volume. The technical ability to retrieve and read the data that is kept by an organization presents yet another challenge for litigants. Data may be irretrievable because it was created using now outdated software or hardware or because it is stored on media (such as disaster-restoration tapes) never intended for ready accessibility, such that the burden and the cost of converting it to readable form are unreasonably disproportionate to the significance of the information or size of the case.

To address these concerns, the new rules adopt the *Zubulake* rationale of producing in the normal case only documents that are "reasonably accessible."[12] The new Rule 26(b)(2)(B) provides:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions of the discovery.

This section of the proposed amendments requires the producing party to identify the sources it claims to be inaccessible because of undue burden or cost and which therefore will not be searched. It is not clear from the amended rule specifically when this identification must actually take place.

Upon a motion to compel, the proposed rule provides that the burden is on the producing party to show that documents requested are not reasonably accessible. If that burden is met, then the requesting party must show good cause to obtain the information.

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11. *Supra* note 1.
12. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("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 documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes, for example, 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, that is, they are actively used for information retrieval, then such tapes would likely be subject to the litigation hold. However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of key players to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.").

The rule does not provide any discussion of what constitutes, *prima facie*, inaccessible evidence. Arguably, at present, legacy data (data no longer being used in company operations), backup tapes (if used simply for disaster-recovery purposes), and fragmented data postdeletion are all examples of inaccessible evidence. *See Zubulake*, 220 F.R.D. at 218. However, technical developments that reduce the cost and burden of searching these media may in the future transform them from "inaccessible" to "accessible." Ongoing familiarity with available search-and-retrieval technologies therefore will be increasingly critical under the new rules.

As case law and the committee notes reflect, even inaccessible material may be ordered produced under certain conditions, including the shifting of the cost of production to the requesting party. The committee notes to Rule 26(b)(2)(B) outline a number of factors to be taken into account in assessing whether good cause has been shown to require production of information that is not reasonably accessible. These factors, though similar to the factors set forth in *Zubulake*,[13] are not identical. Specifically, the committee identifies the following seven factors:

- The specificity of the discovery request.
- The quantity of information available from other, more easily accessed sources.
- The failure to produce relevant information that seems likely to have existed but is no longer available from more easily accessed sources.
- The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.
- Predictions as to the importance and usefulness of the requested information.
- The importance of the issues at stake in the litigation.
- The parties' resources.

Before asserting inaccessibility (and even after asserting it), parties must be prepared to address each of these factors, as a court may still order production of the materials. Concrete, technical, and verified information will need to be readily available to support any assertions of inaccessibility, as the court balances the costs of production versus the potential benefits of further discovery.

SPECIFIED FORMATS FOR PRODUCTION

Rule 34 adds provisions specifically addressing the form in which electronic data is to be provided. Proposed Rule 34(b) provides that in a Rule 34 document request, a requesting party may specify the form(s) in which ESI is to be produced. The rule further provides that the responding party shall "includ[e] an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection" and that "[i]f objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use."

Rule 34 further provides that unless the court orders otherwise or the parties agree, the production of electronically stored information may be made in the form in which it is ordinarily maintained or in a form that is reasonably usable. Further, a party need not produce information in more than one form.

Rule 34(b) thus permits but does not require that the form of ESI production be specified in a Rule 34 document request, but it does mandatorily require objection to any requested format or, if no form was stated, a specification of the form(s) the producing party intends to use. Though not mandatory, best practice is to specify in the original Rule 34 document request the specific form(s) in which you want the ESI produced. At a minimum, carefully review Rule 34 responses to see what format your opponent proposes and, if you want something different, act promptly.

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13. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322-23 (S.D.N.Y. 2003) (identifying the seven factors as "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" but noting the factors are not weighted equally, as the "central question must be, does the request impose an 'undue burden or expense' on the responding party?").

In applying the new Rule 34, a key battleground will be the production of computer files typically used by companies to manipulate data such as spreadsheets.[14] Producing spreadsheets in "native format" (*i.e.,* an Excel spreadsheet produced as an .xls file) permits the receiving party to see formulas and other information regarding preparation of the file and may include "hidden" columns that a reviewer of hard-copy versions would not see. Production of the same spreadsheets as a .pdf or .tiff file provides only a presentation version of the spreadsheet (a paper-copy equivalent that is not capable of manipulation).

If the parties cannot agree, or if a form has not been specified by the court, then under Rule 34(b) at (ii) the default form of production is either the form in which the information is maintained or a form that is reasonably usable, which may mean searchable, if the information was maintained in a searchable format.

POTENTIAL AVAILABILITY OF A SAFE HARBOR FOR HONEST MISTAKES

The new rules also seek to address the problem of courts awarding large sanctions for what, in some instances, appear to be honest mistakes. The absence of a rule addressing sanctions was perceived to create situations in which either unfair penalties were imposed or companies erred on the side of caution, keeping too much material and exacerbating the volume problem that lies at the heart of the e-discovery challenge. The revised rules tackle the sanctions issue in Rule 37(f), which provides that:

> Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

While this change recognizes a safe harbor, it does not excuse a party from evaluating and fulfilling its obligation to preserve discoverable evidence. When evaluating good faith, a party's specific preservation steps obviously will play a role, and it will remain a case-by-case determination of whether the loss of information was truly the result of good-faith error or rather willful or negligent blindness to the requirements of electronic data preservation. Ignorance is not bliss in this safe harbor. Courts increasingly expect parties to be familiar with the operation of their computer systems and are less and less inclined to "excuse" failures in this area, such as a failure to suspend autodelete operations or protect against a loss of metadata.

PARALLEL REVISIONS TO SUBPOENA OBLIGATIONS

Rule 45, relating to the obligations of third-party recipients of a subpoena, contains conforming changes that essentially incorporate into Rule 45 the definitional and procedural principles addressed above.

CONCLUSION

The amendments to the Rules of Civil Procedure highlighted in this *Commentary* will affect how a corporation's business, legal, and information technology departments interact with one another and how, in turn, the corporation interacts with outside litigation counsel. The amendments mandate early and thorough understanding of where and how a client's potentially relevant electronic data is stored, retrieved, and deleted. The rule changes will lead to earlier analysis of the procedure and costs of searching for and retrieving responsive information. The amendments also provide an incentive to requesting parties to be specific as to the information they want and the form in which they want it. Front-loading these considerations should remove some of the trepidation and

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14. *See, e.g., Williams v. Sprint/United Mgmt. Co.,* 230 F.R.D. 640, 652 (D. Kan. 2000) (finding that defendant must produce Excel spreadsheets without redacting metadata, unless the producing party timely objects to producing metadata, the parties agree that metadata is not to be produced, or the producing party seeks a protective order to prevent disclosure).

uncertainty involved in electronic discovery, as courts will now have fundamental ground rules in place and can encourage parties, through scheduling orders, discovery plans, and case management orders, to define the role electronic discovery will play in litigation.

On the other hand, the changed rules also confirm that a responsive party can no longer avoid addressing these issues head-on. In the past, even very sophisticated entities sometimes chose to ignore the "electronic elephant in the room," operating on the principle that if one side didn't raise the issue, the other wouldn't either. Those days are now gone, as the new federal rules reflect the policy choice that disclosure and discussion will be the order of the day.

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APPENDIX

SELECTED PORTIONS OF PROPOSED FEDERAL RULES

Rule 16. Pretrial Conferences; Scheduling; Management

(b) **Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) ***provisions for disclosure or discovery of electronically stored information;***

(6) ***any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production;***

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

(8) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as possible but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

(a) Required Disclosures; Methods to Discover Additional Matter

(1) **Initial disclosures.** Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or description by category and location of, all documents, ***electronically stored information,*** and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

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(b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(2) Limitations

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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(5) **Claims of Privilege or Protection of Trial Preparation Materials.**

(A) **Information withheld.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information produced. If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

* * *

(f) **Conference of Parties; Planning for Discovery.** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), ***to discuss any issues relating to preserving discoverable information,*** and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

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

(4) any issues relating to claims of privilege or protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

Rule 33. Interrogatories to Parties

(d) **Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, ***including electronically stored information,*** 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 a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

(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, copy, ***test, or sample*** any designated ***documents or electronically stored information*** – including writings, drawings, graphs, charts, photographs, ***sound recordings, images,*** and other ***data*** or data compilations ***stored in any medium*** – from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form, or to inspect, 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; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. 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 or forms in which electronically stored information is to be produced.*** Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. 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 or forms for producing electronically stored information, stating*** the reasons for the objection. If objection is made to part of an item or category, the party shall be specified and inspection permitted of the remaining parts. ***If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use.*** The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders, (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; and (ii) if a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and (iii) a party need not produce the same electronically stored information in more than one form.

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Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

(f) Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

Form 35. Report of Parties' Planning Meeting

3. **Discovery Plan**. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed)

Disclosure or discovery of electronically stored information should be handled as follows: (brief description of parties' proposals)

The parties have agreed to an order regarding claims of privilege or protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order)

All discovery commenced in time to be completed by (date). [Discovery on (issue for early discovery) to be completed by (date).]