

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the matter of)	
)	
Evanston Northwestern Healthcare Corporation,)	Docket No. 9315
a corporation, and)	
)	(Public Record Version)
ENH Medical Group, Inc.,)	
a corporation.)	
)	

**RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S
MOTION FOR LEAVE TO TAKE DISCOVERY AFTER DISCOVERY
CUT-OFF DATE AND STAY CONSIDERATION OF MOTION TO COMPEL**

Pursuant to the Federal Trade Commission's Rules of Practice ("Rules"), 16 C.F.R. § 3.22(c), Respondents Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group, Inc., by counsel, hereby oppose Complaint Counsel's Motion for Leave to Take Discovery After Discovery Cut-Off Date and Stay Consideration of Motion to Compel ("Motion for Leave"). As demonstrated below, the Motion for Leave should be denied because Complaint Counsel has not showed "good cause" to take the requested depositions after the close of fact discovery.

BACKGROUND

On August 19, 2004, Complaint Counsel filed a motion to compel ("Motion to Compel") that: (1) seeks an order requiring Respondents to produce usable, responsive data from two to three dozen electronic backup tapes; and (2) implicitly requests the right to take depositions concerning this information after the close of fact discovery. Complaint Counsel acknowledged on page 16 of its memorandum in support of the Motion to Compel that "a court

must assess the total cost of production” when considering whether to compel discovery from backup tapes. As of the date of the Motion to Compel, however, Complaint Counsel had decided not to take formal discovery on this issue. Instead, Complaint Counsel cited to Respondents’ cost estimate [REDACTED] and represented that it “cannot offer the Court [its own] meaningful assessment of the cost of this discovery because, until now, Respondents have been unwilling to schedule a meeting between the information technology experts for the Commission and Respondents which is necessary to make a meaningful estimate of the costs.” Complaint Counsel did not argue in the Motion to Compel, because it could not have argued at the time (when fact discovery was still ongoing), that it was precluded from taking formal discovery on the issue of how much it would cost to restore, process and publish the backup tape information at issue.

On September 2, 2004, Respondents opposed the Motion to Compel on multiple, independent grounds – including, but not limited to, the following:

- The requested discovery from backup tapes, if granted, would likely cost Respondents [REDACTED] – a price tag that is too high on its face to comport with the discovery rules or, for that matter, Respondents’ due process rights.
- More than 1.2 million pages of documents already have been produced in discovery, and additional electronic communications will be produced in the ongoing production of electronic documents. Consequently, the extraordinary burdens associated with Complaint Counsel’s requested relief, in terms of both time and cost, easily outweigh the marginal benefit of restoring backup tapes that will likely yield cumulative and/or irrelevant information.
- Respondents already have made an extraordinary effort to produce electronic documents and have expended [REDACTED] pertaining solely to this process. This effort easily satisfies Respondents’ electronic discovery obligations.
- Complaint Counsel refuses to share any of the costs of restoring backup data even though the costs of such a production are routinely shifted to the party seeking production. Such refusal, standing alone, is a sufficient reason to deny the Motion to Compel.

- Finally, the requested relief, if granted, would require respondents to devote significant resources to reviewing the backup materials in the midst of preparing for trial – a process that would likely lead to significant delays in the remaining deadlines in the Second Revised Scheduling Order. In fact, this review and production would potentially require postponing the commencement of the trial until the middle of next year – all in a search for relevant documents that may or may not exist. Such a delay is unwarranted because Complaint Counsel has not shown that the backup tapes are likely to include *any* specific relevant information over and above what already has been produced by Respondents or third-parties in this matter.

Respondents attached to their opposition four declarations primarily to support the first argument outlined above, *i.e.*, the cost of restoring, processing and publishing backup tape data is unduly burdensome on its face. These declarations merely confirmed under oath information provided to Complaint Counsel in writing on August 11 and 13, 2004. *See*[REDACTED]

On September 8, 2004 – almost one month after the parties exchanged detailed correspondence concerning the backup tape issue, six days after Respondents opposed the Motion to Compel, and five days before the close of fact discovery on September 13, 2004 – Complaint Counsel filed its Motion for Leave and asserted, for the first time, that it purportedly needed to take formal discovery concerning Respondents’ backup tapes.¹ The Motion for Leave seeks an indefinite stay of the Motion to Compel pending the requested depositions. Complaint Counsel makes no representation to the Court on how its Motion for Leave (or, for that matter, the Motion to Compel) will affect the deadlines and hearing date in the Second Revised Scheduling Order.

¹ Under Rule 3.22(c), Complaint Counsel had no right to file a reply brief in support of its Motion to Compel and has not sought leave from this Court to do so. This may explain why the Motion for Leave addresses substantive issues pertaining to the Motion to Compel and is not limited to the pertinent issue concerning the Motion for Leave – *i.e.*, whether Complaint Counsel has established “good cause” to take the requested depositions after the close of fact discovery (a standard not even discussed in the Motion for Leave). *See, e.g.*, Mem. in Supp. of Mot. for Leave at 2 n.1, 4.

ARGUMENT

Under Rule 3.21(c)(2), this Court “may grant a motion to extend any deadline [including, but not limited to, the close of fact discovery on September 13, 2004] or time specified in th[e] scheduling order *only upon a showing of good cause.*” (Emphasis added.) The first “additional provision” of the Scheduling Order in this case echoes this “good cause” requirement.

In *Chicago Bridge & Iron Co.*, 2002 FTC LEXIS 69 (Dkt. 9300, Oct. 23, 2002), the Court explained that “[g]ood cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met *despite the diligence of the party seeking the extension.*” *Id.* at *5 (Ex. 1) (emphasis added). There, Complaint Counsel was trying to add three witnesses to its witness list after the discovery period. The Court did not find “good cause” existed concerning two of those witnesses due to Complaint Counsel’s lack of “sufficient diligence” to meet the pertinent scheduling order deadline:

Complaint Counsel asserts that it was delayed in learning of the information [one witness] may provide due to Respondents’ delayed response to Complaint Counsel’s Second Request for Production of Documents. Based on that representation, Complaint Counsel has demonstrated that Complaint Counsel’s delay in learning about the information that the first witness may provide is attributable to Respondents. Accordingly, Complaint Counsel has demonstrated diligence sufficient to show good cause for including the first witness on Complaint Counsel’s final witness list. *As to the second and third witnesses, Complaint Counsel makes no claim that its delay in learning of these individuals is attributable in any way to Respondents. Complaint Counsel has not demonstrated sufficient diligence to show good cause for including the second and third witnesses on Complaint Counsel’s final witness list.*

Id. at *8-*9 (emphasis added); *see also id.* at *7-*8 (“Simply claiming that the importance of these individuals was learned late in the discovery process does not satisfy the ‘good cause’ standard since diligence is required in pursuing discovery.”).

Complaint Counsel’s request here to take depositions after the close of fact discovery should be similarly denied for two reasons. First, Complaint Counsel showed *no* diligence during the discovery period to take formal discovery concerning Respondents’ information technology systems and the cost of restoring backup data. Second, the requested out-of-time discovery will not assist the Court in deciding the Motion to Compel, and the requested stay will materially, and unnecessarily, delay the hearing.

I. The Motion for Leave Should Be Denied Because Complaint Counsel Could Have Taken The Requested Discovery At Least One Month Before The Close Of Fact Discovery.

In its Motion for Leave, Complaint Counsel does not, because it cannot, provide the Court with any viable excuse for waiting until the end of fact discovery to institute formal discovery concerning the backup tape issue. As discussed in the Motion to Compel, the parties exchanged detailed correspondence concerning this issue in mid-August 2004. Undersigned counsel’s letter dated August 11, 2004, describes in depth: (1) Respondents’ current review of electronic documents, (2) archived data stored on Respondents’ backup tapes, and (3) answers to specific information technology questions posed by Complaint Counsel. Ex. 2. The letter dated August 13, 2004, [REDACTED] The information contained in this correspondence is consistent with, and largely mirrors, the information provided by the declarants at issue in their respective declarations. In fact, the cost estimate attached to the letter dated August 13, 2004, is identical to the cost estimate attached to the declaration of [REDACTED] submitted with Respondents’ opposition to the Motion to Compel.

To the extent Complaint Counsel desired additional information concerning Respondents' backup data, it was perfectly able at the time of this mid-August correspondence – one month before the close of discovery – to notice depositions of: (1) Respondents, in their corporate capacities, under Rule 3.33(c); (2) individual information technology employees of Respondents; (3) Respondents' vendor pursuant to Rule 3.33(c); or (4) individual employees of that vendor. Complaint Counsel also could have issued requests for production or interrogatories concerning information technology issues before the deadlines for such discovery. Complaint Counsel, however, took none of these steps and, in fact, waited almost one week after Respondents opposed the Motion to Compel even to mention potential depositions limited to information technology issues.² Complaint Counsel had every opportunity to test the factual assertions at issue through reasonable discovery during the fact discovery period. Given Complaint Counsel's complete lack of diligence to pursue such discovery in a timely manner, there is no possible "good cause" for allowing the requested depositions to take place after the fact discovery deadline.

II. The Motion for Leave Also Should Be Denied Because The Requested Discovery Will Not Assist The Court In Deciding The Motion To Compel And Will Materially Delay The Hearing.

Complaint Counsel argues that this Court cannot adequately consider the Motion to Compel without first assessing deposition testimony of the declarants at issue. This is a

² Complaint Counsel represented in its Motion for Leave that because fact discovery closed on September 13, 2004, and because a number of depositions were scheduled for the final days of the fact discovery period, "Complaint Counsel did not have the time to prepare (or to depose) the Affiants" before the close of fact discovery. Mem. in Supp. of Mot. for Leave at 3. The very same day, however, Complaint Counsel filed a notice to take the deposition of one of ENH's employees, David Loveland, on September 13, 2004, the last day of fact discovery. Respondents moved to quash that deposition notice on the identical ground asserted by Complaint Counsel in the Motion for Leave – namely, that the parties did not have enough time to depose Mr. Loveland and prepare for that deposition. In stark contrast to its position in the Motion for Leave, Complaint Counsel argued in its opposition to the motion to quash that the parties *did have* adequate time to take depositions in the final three business days of fact discovery. To date, Complaint Counsel has made no effort to explain its inconsistent representations to the Court.

serious stretch. There is more than enough information for this Court to deny both the Motion to Compel and the Motion for Leave based solely on the papers.

A. The Stated Reasons For Complaint Counsel's Belated Discovery Are Unpersuasive.

Complaint Counsel offers several unpersuasive reasons to support its request to take out-of-time deposition discovery on information technology issues. As an initial matter, Complaint Counsel continues to mistakenly assert that no discovery is unduly burdensome in complex antitrust litigation (even if fact discovery has closed), and the burden of paying for the expensive restoration of backup data should rest entirely with Respondents. This position conflicts with Rule 3.31(c)(1) as well as the case chiefly relied on by Complaint Counsel, *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 320 (S.D.N.Y. 2003), which noted that *all* prior reported decisions addressing the discovery of backup tapes “have ordered the cost of discovery to be shifted to the requesting party.” *Id.* at 320; *see also id.* at 324 (concluding that the court “will conduct the appropriate cost-shifting analysis” at the appropriate time). Complaint Counsel still has failed to identify any decision by this Court or the Commission holding that *any* backup tape information had to be produced at all.³

Complaint Counsel's assertions concerning the declarations of [REDACTED] are equally unpersuasive:

³ The cases cited by Complaint Counsel are inapposite or support Respondents' position. The trial court in *In re Amsted Indus., Inc. "ERISA" Litig.*, 2002 WL 31844956 (N.D. Ill. Dec. 18, 2002), did not issue an order compelling the review of backup data but, instead, merely noted that the defendants voluntarily agreed to conduct such a review. Similarly, in *Linnen v. A.H. Robbins Co. Inc.*, 1999 WL 462015 (Mass. Super. Ct. June 16, 1999), the court's decision merely allowed the plaintiffs to obtain backup tape information that would be restored pursuant to a discovery agreement in a separate multi-district litigation case (which agreement contemplated that the party requesting the production could be held responsible for some of the backup tape restoration costs). *Id.* at *5-*6. Finally, Respondents relied on *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001), in their opposition to the Motion to Compel because that case counseled against backup tape fishing expeditions like the one requested by Complaint

[REDACTED]

As a result, ‘[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] . . . the organization of the data mirrors the computer’s structure, not the human records management structure.’ Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making restoration more time-consuming and expensive, especially given the lack of uniform standard governing data compression.” 217 F.R.D. at 319 (citations omitted) (alterations in original).

Counsel here. The court in that case carefully tailored backup tape discovery to the pertinent period. Here, however, ENH has no backup tapes for the first one and one-half years after the January 1, 2000, merger at issue.

Finally, as indicated in footnote 2 of the Memorandum in Support of the Motion for Leave, Complaint Counsel really seeks to depose Respondents' employees to discover information pertaining to Respondents' information technology systems – discovery that could have been taken months ago. Indeed, such discovery is typically taken at the very beginning of complex cases. *See, e.g.*, Aug. 3, 2004, Report of the Civil Rules Advisory Committee (“Rules Report”) at 6-10 (explaining the importance of early attention to electronic discovery issues) (pertinent portions attached as Ex. 4); *id.*, Proposed Amendments to Fed. R. Civ. P. 16(b), 26(f); *Manual for Complex Litig.* (4th) § 11.446 (“The judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case.”). Accordingly, this Court should reject Complaint Counsel’s belated efforts to depose [REDACTED] and/or ENH information technology employees.

[REDACTED]

[REDACTED]

[REDACTED]

B. The Motion for Leave Should Be Denied Because This Court May Deny The Motion To Compel Without Relying On The Declarations At Issue.

As demonstrated below, there is no need or “good cause” to depose [REDACTED] to further probe the expense of Complaint Counsel’s requested relief in the Motion to Compel. Nevertheless, this Court may, and should, deny the Motion to Compel even assuming, for the sake of argument, that this Court needed to consider deposition testimony from the declarants at issue to determine such cost.

For example, this Court could, and should, deny the Motion to Compel on the totally independent basis that fact discovery is now closed and the parties need finality to proceed to the expert phase of discovery and conduct a timely hearing. More than 1.2 million pages of documents already have been produced, including documents identified in Complaint Counsel’s interrogatory answers that purport to reflect “contemporaneous communications of Respondents’ employees regarding both the merger challenged in this litigation and the price fixing conspiracy of Respondents.” Mem. in Supp. of Mot. for Leave at 2. If the discovery already had makes Complaint Counsel’s case as it claims it does, then further similar discovery is duplicative and the Motion to Compel should be denied. If the discovery Complaint Counsel already has does not make its case – contrary to its suggestions in its filings with this Court – then there is no reason to believe that a search for further contemporaneous documents will provide any further support for Complaint Counsel’s case.

Again, Complaint Counsel simply ignores the practical effect of its request to have Respondents restore data from two to three dozen backup tapes and allow additional fact

witness depositions concerning such information. To play out Complaint Counsel's request, fact discovery would have to be reopened and extended for a few months to allow the parties to absorb the incredible volume of electronic data at issue. This, in turn, likely would require expert discovery (to date, ten experts have been identified by the parties) to begin in early 2005. The hearing might then have to be postponed until well into the middle of next year. There is no legal or logical basis for such a result. *Cf.* Rules Report, Proposed Amendment to Fed. R. Civ. P. 26(b)(2)(C) ("A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible" unless court orders such discovery for "good cause."); *see also Manual for Complex Litig.* (4th) § 11.446 (explaining that Fed. R. Civ. P. 26(b)(2) "should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems," and "[m]ore expensive forms of production . . . should be conditioned upon a showing of need or sharing expenses"). This Court should hold Complaint Counsel to its own recent representation that, "[a]t this stage of this litigation, both parties must begin their trial preparations" and, therefore, all fact discovery must be concluded as soon as possible. *Opp'n to Resp'ts' Mot. for a Limited Extension of Disc. Deadline* (filed on Sept. 14, 2004).

The Motion to Compel also could, and should, be denied on the independent basis that Respondents already have spent [REDACTED] pertaining to electronic discovery alone. Any order requiring Respondents to incur, [REDACTED], the entire cost of restoring backup data into a usable format (a process that Complaint Counsel cannot seriously dispute will be very expensive) necessarily would violate Rule 3.31(c)(1). Complaint Counsel's steadfast refusal to contribute to this cost – even in the face of authority showing that these costs are routinely shifted to the party seeking production – is ground enough to deny the Motion to Compel.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Complaint Counsel's Motion for Leave to Take Discovery After Discovery Cut-Off Date and Stay Consideration of Motion to Compel.

September 21, 2004

Respectfully Submitted,



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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2004, a copy of the foregoing *Respondents' Opposition to Complaint Counsel's Motion for Leave to Take Discovery After Discovery Cut-Off Date and Stay Consideration of Motion to Compel* was served by email and first class mail, postage prepaid, on:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580
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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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In the matter of)	
)	
)	
Evanston Northwestern Healthcare Corporation,)	
a corporation, and)	Docket No. 9315
)	
ENH Medical Group, Inc.,)	
a corporation.)	
_____)	

ORDER

Upon consideration of Complaint Counsel’s Motion for Leave to Take Discovery After Discovery Cut-Off Date and Stay Consideration of Motion to Compel (“Motion”) and Respondents’ opposition thereto, and the Court being fully informed, it is this _____ day of _____, 2004 hereby

ORDERED, that the Motion is DENIED.

The Honorable Stephen J. McGuire
CHIEF ADMINISTRATIVE LAW JUDGE
Federal Trade Commission

FOCUS - 2 of 7 DOCUMENTS

In the Matter of CHICAGO BRIDGE & IRON COMPANY N.V., a foreign corporation,
CHICAGO BRIDGE & IRON COMPANY, a corporation, and PITT-DES MOINES,
INC., a corporation

DOCKET NO. 9300

Federal Trade Commission

2002 FTC LEXIS 69

ORDER ON RESPONDENTS' MOTION TO STRIKE WITNESSES

October 23, 2002

ALJ: [*1]

D. Michael Chappell, Administrative Law Judge

ORDER:

I.

On September 26, 2002, Respondents (Chicago Bridge and Iron ("CB&I") and Pitt-Des Moines ("PDM")) filed a Motion to Strike. On October 3, 2002, Complaint Counsel filed its opposition. Complaint Counsel subsequently filed an addendum to its opposition on October 4, 2002. For the reasons set forth below, the motion is GRANTED in part and DENIED in part.

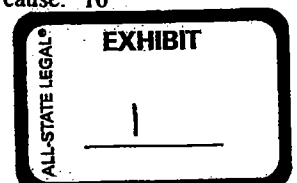
II.

Respondents' motion seeks an order preventing Complaint Counsel from calling as witnesses at trial or otherwise presenting testimony from three fact witnesses on the grounds that the three proposed witnesses were not timely disclosed in accordance with the scheduling orders entered in this matter. The identities of these three witnesses were designated as confidential information by the parties in the confidential versions of their pleadings and need not be revealed in this Order for purposes of ruling on Respondents' motion. They are referred to throughout this Order as the first, second, and third witnesses, in alphabetical sequence, which is also the sequence in which they were first disclosed to Respondents and the sequence in which they are described in Respondents' motion. [*2]

Complaint Counsel asserts that there is good cause for permitting Complaint Counsel to present the testimony of these three CB&I customer witnesses who, only through discovery, Complaint Counsel learned may be able to provide relevant information.

III.

Commission Rule 3.21 requires Administrative Law Judges to enter a scheduling order that "establishes a scheduling of proceedings, including a plan of discovery . . ." 16 C.F.R. § 3.21(c)(1). Pursuant to 16 C.F.R. § 3.21(c)(1), Additional Provision Number Four of the Scheduling Order, entered on February 20, 2002, states that "the final proposed witness list may not include additional witnesses not listed in the preliminary or revised preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause." All subsequent revised scheduling orders state that the "Additional Provisions" of the February 20, 2002 Scheduling Order remain in effect. Under the Commission's Rules of Practice, the Administrative Law Judge may grant a motion to extend any deadline or time specified in the prehearing scheduling order "only upon a showing of good cause." 16 C.F.R. § 3.21(c)(2).



Pursuant [*3] to the Third Revised Scheduling Order, entered on September 10, 2002, Complaint Counsel provided its final proposed witness list by September 16, 2002. Complaint Counsel's final proposed witness list included three additional witnesses who were not designated on Complaint Counsel's preliminary or revised witness lists. Complaint Counsel was required to provide its preliminary witness list on April 23, 2002 and its revised witness list on May 28, 2002. Complaint Counsel informed Respondents of its intent to add one of these three additional witnesses on September 5, 2002, and of its intent to add the other two witnesses on September 13, 2002. Discovery closed in this case on September 6, 2002.

Complaint Counsel did not file a motion to add witnesses, demonstrating good cause, as required by the Scheduling Order. Rather, in response to Respondents' motion to strike, Complaint Counsel argues that it has good cause for adding these witnesses. Specifically, Complaint Counsel asserts that the following circumstances, taken together, demonstrate good cause:

. Complaint Counsel became aware of the important potential information from these individuals only recently through discovery and [*4] identified these individuals to Respondents as soon as Complaint Counsel reached an opinion that it would likely include these witnesses in its final witness list.

. Complaint Counsel could not have known the importance of the first witness until August 27, 2002, because Respondents delayed production of certain e-mail files, responsive to Complaint Counsel's Second Request for Production of Documents, served on June 7, 2002, until August 27, 2002. Complaint Counsel promptly reviewed the August 27, 2002 document production and discovered two e-mail communications, dated July 17, 2002, from the first proposed witness to CB&I. These e-mail communications alerted Complaint Counsel that the first witness is knowledgeable concerning current competitive conditions in the LNG tank market.

. Complaint Counsel could not have known the importance of the second witness until recently. The second witness is a consultant who is advising a U.S. firm on the purchase of a LNG tank for construction in the United States. Complaint Counsel became aware of him at the end of July 2002, based on a telephone conversation with a third party. Complaint Counsel first interviewed the second witness on July [*5] 26, 2002. Through a declaration, this witness states that in April 2002, he requested bids for the project. Complaint Counsel states that the subsequent responses to these bids could not have been known to Complaint Counsel when Complaint Counsel submitted its Preliminary Witness List (April 22, 2002) or its Revised Witness List (May 28, 2002).

. Complaint Counsel did not know about the third witness until Complaint Counsel had a conversation in early September 2002 with a third-party witness who informed Complaint Counsel that during a 1998 bid contest for a LNG tank peak-shaving plant, two foreign LNG tank constructors submitted bids that were higher than the bids submitted by CB&I and PDM. The third witness works for a company that received bids from CB&I and PDM.

IV.

Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension. *Bradford v. Dana Corp.*, 249 F.3d 807, 809 (8th Cir. 2001); *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998); Fed. R. Civ. P. 16 Advisory Committee Notes (1983 amendment). For each of these three witnesses, Complaint [*6] Counsel's only argument is that it didn't know about this person or his importance until recently.

Since the original Scheduling Order was entered on February 20, 2002, the scheduling order has been revised three times. In the February 20, 2002 Scheduling Order, Complaint Counsel was required to provide its preliminary witness list on April 23, 2002, and its revised witness list on May 25, 2002. Discovery was scheduled to close on June 7, 2002. In the First Revised Scheduling Order, entered May 6, 2002 upon a motion filed jointly by both parties, the dates for preliminary and revised witness lists remained substantially the same, but the close of discovery was extended by one month. The First Revised Scheduling Order required Complaint Counsel to provide its preliminary witness list on April 23, 2002 and its revised witness list on May 28, 2002. Discovery was scheduled to close on July 8, 2002. In the Second Revised Scheduling Order, entered on June 18, 2002 upon Respondents' motion, which was opposed by Complaint Counsel, the dates for preliminary and revised witness lists remained the same, but the close of discovery was extended

by two additional months, to September 6, 2002. The [*7] Third Revised Scheduling Order, entered on September 10, 2002, did not change dates for witness lists or the close of discovery.

The parties, in moving for the first revision of the scheduling order, requested an extension for the close of discovery, but did not seek extensions of time for providing preliminary and revised witness lists. Complaint Counsel, in opposing Respondents' motion for the second revision, did not argue that discovery should not be extended because Complaint Counsel had already served its revised witness list. Thus, although the close of discovery was extended, the deadlines for providing preliminary and revised witness lists remained unchanged.

According to Respondents, Complaint Counsel has been investigating this matter for nearly two years. The Complaint was filed nearly one year ago. Discovery should have been pursued expeditiously soon thereafter, as the parties were forewarned. Chicago Bridge & Iron Co., Docket 9300 (January 4, 2002) ("In the event the parties are not able to settle this matter, the discovery and trial schedule issued will meet the October 28, 2002 deadline."). Simply claiming that the importance of these individuals was learned late [*8] in the discovery process does not satisfy the "good cause" standard since diligence is required in pursuing discovery. However, if Complaint Counsel's delay in learning about the information that may be provided by these individuals is attributable to Respondents, Complaint Counsel may have demonstrated good cause.

As to the first witness, Complaint Counsel asserts that it was delayed in learning of the information he may provide due to Respondents' delayed response to Complaint Counsel's Second Request for Production of Documents. Based on that representation, Complaint Counsel has demonstrated that Complaint Counsel's delay in learning about the information that the first witness may provide is attributable to Respondents. Accordingly, Complaint Counsel has demonstrated diligence sufficient to show good cause for including the first witness on Complaint Counsel's final witness list.

As to the second and third witnesses, Complaint Counsel makes no claim that its delay in learning of these individuals is attributable in any way to Respondents. Complaint Counsel has not demonstrated sufficient diligence to show good cause for including the second and third witnesses on Complaint Counsel's [*9] final witness list.

V.

For the reasons set forth above, Respondents' motion is GRANTED in part and DENIED in part. Complaint Counsel has demonstrated good cause for adding the first witness described in Respondents' motion, the author of the e-mail communications that were produced by Respondents on August 27, 2002, to Complaint Counsel's final witness list. The deposition of this witness may be taken beyond the discovery deadline.

This Order does not constitute a ruling on the admissibility of exhibits referred to in Respondents' motion or Complaint Counsel's opposition.

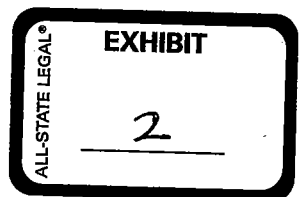
ORDERED:

D. Michael Chappell

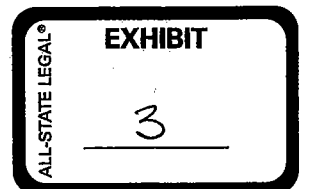
Administrative Law Judge

Date: October 23, 2002

REDACTED



REDACTED



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

CHAIRS OF ADVISORY COMMITTEES

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

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

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

Date: May 17, 2004, Revised, August 3, 2004

Re: Report of the Civil Rules Advisory Committee

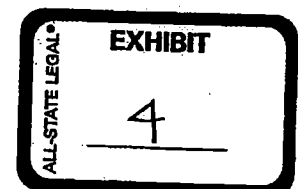
Introduction

The Civil Rules Advisory Committee met at a conference on electronic discovery at Fordham Law School on February 20-21, 2004, and met again at the Administrative Office of the United States Courts on April 15-16, 2004. Style Subcommittees A and B met at Fordham Law School, one on February 19 and the other on February 21. The Discovery Subcommittee met on March 20 at the Administrative Office of the United States Courts. The several Subcommittees also met by conference calls during the time since the January meeting of the Standing Committee.

* * * * *

Part I B recommends several proposals for publication for comment in August 2004. One proposal is to amend Rule 50. A package of proposals aimed at discovery of electronically stored information includes amendments to Rules 16, 26, 33, 34, 37, and 45, along with a related amendment of Form 35. Another package includes a new Supplemental Rule G for civil asset forfeiture actions, along with conforming amendments of Supplemental Rules A, C, and E.

* * * * *



II Action Items: Rules Recommended for Publication

**A. PROPOSED AMENDMENTS INVOLVING
ELECTRONIC DISCOVERY**

Introduction

The Civil Rules Committee recommends that the Standing Committee publish for comment a package of proposed rule amendments relating to the discovery of electronically stored information. Over the past five years, the Committee has examined whether the rules adequately accommodate discovery of information generated by, stored in, retrieved from, and exchanged through, computers. During this period, electronic discovery has moved from an unusual activity encountered in large cases to a frequently-seen activity, used in an increasing proportion of the litigation filed in the federal courts. The Committee has been urged by organized bar groups, litigants, lawyers, and judges to consider rules changes that accommodate the distinctive features of such discovery.

Electronic discovery exhibits several distinctive features that may warrant treatment in the rules. Perhaps the most prominent is the exponentially greater volume that characterizes electronic data, which makes this form of discovery more burdensome, costly, and time-consuming.

The *Manual for Complex Litigation* (4th) § 11.446 illustrates the problems of volume that can arise with electronically stored information:

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

Electronically stored information may exist in dynamic databases that do not correspond to hard-copy materials. Electronic information, unlike words on paper, is dynamic. The ordinary operation of computers—including the simple act of turning a computer on or off or accessing a particular file—can alter or destroy electronically stored information, and computer systems automatically discard or overwrite data as a part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard-copy materials. Electronically stored information may be "deleted" yet continue to exist, but in forms difficult to locate, retrieve, or search. Electronic data, unlike paper, may be incomprehensible when separated from the system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery. Uncertainty as to how to treat these distinctive features under the present rules exacerbates the problems. Case law is emerging, but it is not consistent and discovery disputes are rarely the subject of appellate review. Although the federal discovery rules are well drafted to be flexible, it is becoming increasingly clear that they do not adequately accommodate the new forms of information technology. If the rules do not change, they risk becoming increasingly removed from practice.

The uncertainties and problems lawyers, litigants, and judges face in handling electronic discovery under the present federal discovery rules are reflected in the growing demand for additional rules in this area. At least four United States district courts have adopted local rules to address electronic discovery, and many more are under consideration. Two states have, and more are considering, court rules specifically addressing these issues. There is much to be said for these local rules and much has been learned from experience under them. But if there is delay in considering whether to change the federal rules, the timetable of the rulemaking process will inevitably result in a proliferation of local rules. Adoption of differing local rules by many district courts may freeze in place different practices and frustrate the ability to achieve the national standard the Civil Rules were intended to provide in the areas they address. As electronic discovery becomes more and more common, the burdens and costs of complying with unclear and inconsistent discovery obligations, which vary from district to district in ways unwarranted by local variations in practice, will also increase.

Publication for comment is more critical in this area than for many other proposed rule amendments. Litigants and lawyers live with the problems raised by electronic discovery in ways that judges do not. The Advisory Committee welcomes comments on all aspects of the proposed amendments and has indicated certain areas in which comment will be particularly helpful. The comments from litigants and lawyers on specific proposals for rules that attempt to accommodate electronic discovery, as it is practiced today and as it will develop in the future, are essential. The challenge is to ensure that the rules provide effective support and guidance for managing discovery practice as it changes with technology.

1. Background and Synopsis

To gather information from diverse segments of the bar and to hear from judges, the Committee held two mini-conferences in 2000—one in San Francisco and the other in Brooklyn—and a major conference in February 2004 at the Fordham Law School. The Committee has also drawn on the accumulation of experience reflected in case law, in the expanded treatment in the fourth edition of the *Manual for Complex Litigation*, and in “best practices” protocols drafted by the ABA Litigation Section and other organized bar groups. This work has led the Committee to conclude that it is time to present proposed rule changes for public comment. Through its discovery subcommittee, chaired by Professor Myles Lynk and supported by Professor Edward Cooper, Reporter to the Committee, and Professor Richard L. Marcus, who was retained as Special Reporter to assist the subcommittee, the Committee has drafted proposed amendments to Rules 16, 26, 33, 34, 37, and 45 and revisions to Form 35, with accompanying Notes. These amendments are aimed at making the rules better able to accommodate the qualitative and quantitative differences between electronic discovery and conventional discovery and to provide a framework to resolve the issues electronic discovery presents.

The proposed amendments address five related areas: (a) early attention to issues relating to electronic discovery, including the form of production, preservation of electronically stored information, and problems of reviewing electronically stored information for privilege; (b) discovery of electronically stored information that is not reasonably accessible; (c) the assertion of privilege after production; (d) the application of Rules 33 and 34 to electronically stored information; and (e) a limit on sanctions under Rule 37 for the loss of electronically stored

information as a result of the routine operation of computer systems. In addition, amendments to Rule 45 are made to correspond to the proposed changes in Rules 26-37.

2. The Discovery Rules Proposals

a. Early Attention to Electronic Discovery Issues

The proposed amendments to Rule 16, Rule 26(f), and Form 35 present a framework for the parties and court to give early attention to issues relating to the disclosure or discovery of electronically stored information. Under the proposed amendments to Rule 26(f), the parties are to address during their conference any issues relating to the disclosure or discovery of electronically stored information, including the form of production, and also to discuss issues relating to the preservation of electronically stored information and other information that may be sought during discovery. In addition, the amendment to Rule 26(f) calls for discussion of whether the parties can agree on an approach to production that protects against privilege waiver. The results of these discussions are to be included, as appropriate, in the discovery plan presented to the court. Form 35 is amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court. The scheduling order under Rule 16, as amended, may include provisions on the disclosure or discovery of electronically stored information and may include a case-management order adopting the parties' agreements for protection against waiving privilege.

These provisions focus early attention on managing discovery of electronically stored information in cases where problems are likely to

arise. The Committee Note emphasizes that if the parties do not anticipate discovery of electronically stored information, there is no need to discuss these issues. When such discovery is anticipated, the rule amendments focus the parties and the court on early identification and resolution of problems, particularly in the sensitive areas of form of production, privilege review, and preservation. The volume and dynamic nature of electronically stored information make the problems presented by each of these areas more acute than in conventional discovery.

These proposed amendments to Rules 16(b) and 26(f) and to Form 35 work in tandem with proposed amendments to Rule 34(b), which authorize the requesting party to specify the form in which electronically stored information should be produced and set up a framework for resolving disputes over the form of producing such information; Rule 26(b)(2), which state that a party need not provide discovery of electronically stored information that is not reasonably accessible unless the court orders discovery for good cause; Rule 26(b)(5)(B), which provide a procedure for asserting privilege after production of privileged information; and Rule 37(f), which address a party's inability to provide discovery of electronically stored information lost as a result of the routine operation of a party's electronic information system.

The proposals focus on three particularly troublesome aspects of discovery of electronically stored information. One is preserving electronically stored information. As the Note to proposed Rule 26(f) points out, the volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Suspension of all

or a significant part of that activity could paralyze a party's operations. An overbroad approach to preservation may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their operations. In Rule 26(f), the parties are directed to discuss preservation of discoverable information during their conference to develop the discovery plan. Although this provision applies to all discoverable information, it is particularly important with regard to electronically stored information. The Note emphasizes that the parties should be specific, balancing preservation needs with the need to continue ordinary operations of computer systems. Rule 16(b)(5) states that the scheduling order should include provisions relating to discovery of electronic information that emerge from the parties' conference and that the court approves, which may include preservation of electronic information.

The second area is privilege review and waiver. The Committee has repeatedly been told that the burden, costs, and difficulties of privilege review are compounded with electronically stored information. The volume of such information and the informality of certain kinds of electronic communications, such as e-mails, make privilege review more difficult, time-consuming, and expensive. Materials subject to a claim of privilege are often difficult to identify, in part because computers may retain information that is not apparent to the reader. Such information may include embedded data (earlier edits that may be hidden from a "paper" view of the material or the image displayed on a computer monitor) and metadata (automatically created identifying information about the history or management of an electronic file). Parties frequently attempt to minimize the cost and delay of an exhaustive privilege review by agreeing to protocols that minimize the risk of waiver. Such protocols may include so-called quick peek or claw back arrangements, which allow production

without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege.

The *Manual for Complex Litigation* notes these difficulties:

A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Manual for Complex Litigation (4th) § 11.446.

The proposed amendments to Rule 16(b)(6), Rule 26(f)(4), and Form 35 provide that if the parties can agree to an arrangement that allows production without a complete privilege review and protects against waiver, the court may enter a case-management order adopting that agreement. The proposed amendments do not require the parties to reach such an agreement or authorize the court to order one without the parties' agreement. Although the amendments apply to all discoverable

information, they are particularly important with regard to electronically stored information.

The proposed amendment of Rule 26(f)(4) is limited to the parties' discussion of whether to include in the discovery plan an agreement that the court should enter an order protecting the right to assert privilege after production of privileged information. The Committee is particularly interested in receiving comment on whether this amendment should be less restrictive, similar to proposed Rule 26(f)(3). A less restrictive rule would direct the parties to discuss and include in the discovery plan any issues relating to the protection of privileged information in discovery. The third area of focus is the form of production. Unlike conventional discovery, in which there is essentially one option for the form in which information is provided—paper—electronic discovery presents a number of options. These options include the choice between production in hard-copy or electronic form, as well as choices among different electronic formats. The proposed amendments to Rules 16(b) and 26(f)(3) and to Form 35 direct the parties to consider, and the court to include in the scheduling order, provisions for discovery of electronically stored information, which could include arrangements for the form of production.

b. Discovery into Electronically Stored Information that is Not Reasonably Accessible

The proposed amendment to Rule 26(b)(2) clarifies the obligations of a responding party to provide discovery of electronically stored information that is not reasonably accessible, an increasingly disputed aspect of such discovery. The Note explains that the proposed amendment is required because of the staggering volume of electronically

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE***

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling and Planning. Except in categories of actions

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exempted by district court rule as inappropriate, the district judge,

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or a magistrate judge when authorized by district court rule, shall,

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after receiving the report from the parties under Rule 26(f) or after

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consulting with the attorneys for the parties and any unrepresented

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parties by a scheduling conference, telephone, mail, or other

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suitable means, enter a scheduling order that limits the time

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

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(2) to file motions; and

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(3) to complete discovery.

12

The scheduling order may also include

* New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF CIVIL PROCEDURE

13 (4) modifications of the times for disclosures under Rules
14 26(a) and 26(e)(1) and of the extent of discovery to be
15 permitted;

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

18 (6) adoption of the parties' agreement for protection
19 against waiving privilege;

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

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

24 The order shall issue as soon as practicable but in any event within
25 90 days after the appearance of a defendant and within 120 days
26 after the complaint has been served on a defendant. A schedule
27 shall not be modified except upon a showing of good cause and

28 by leave of the district judge or, when authorized by local rule, by
29 a magistrate judge.

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Committee Note

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise.

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege to enable the party seeking production to designate the materials desired for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged information is inadvertently produced the producing party may by timely notice assert the privilege and obtain return of the materials without waiving the privilege. Other arrangements are possible. A case-management order to effectuate the parties' agreement may be helpful in

avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation* (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such directives in the court's case management order. Court adoption of the chosen procedure by order advances enforcement of the agreement between the parties and adds protection against nonparty assertions that privilege has been waived. The rule does not provide the court with authority to enter such a case-management order without party agreement, or limit the court's authority to act on motion.

Rule 26. General Provisions Governing Discovery; Duty of

Disclosure

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(b) Discovery Scope and Limits. Unless otherwise limited by

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order of the court in accordance with these rules, the scope

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of discovery is as follows:

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(2) Limitations. By order, the court may alter the limits in

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these rules on the number of depositions and interrogatories

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or the length of depositions under Rule 30. By order or

9 local rule, the court may also limit the number of requests
10 under Rule 36. The frequency or extent of use of the
11 discovery methods otherwise permitted under these rules
12 and by any local rule shall be limited by the court if it
13 determines that: (i) the discovery sought is unreasonably
14 cumulative or duplicative, or is obtainable from some other
15 source that is more convenient, less burdensome, or less
16 expensive; (ii) the party seeking discovery has had ample
17 opportunity by discovery in the action to obtain the
18 information sought; or (iii) the burden or expense of the
19 proposed discovery outweighs its likely benefit, taking into
20 account the needs of the case, the amount in controversy,
21 the parties' resources, the importance of the issues at stake
22 in the litigation, and the importance of the proposed
23 discovery in resolving the issues. The court may act upon its
24 own initiative after reasonable notice or pursuant to a motion

6 FEDERAL RULES OF CIVIL PROCEDURE

25 under Rule 26(c). A party need not provide discovery of
26 electronically stored information that the party identifies as
27 not reasonably accessible. On motion by the requesting
28 party, the responding party must show that the information
29 is not reasonably accessible. If that showing is made, the
30 court may order discovery of the information for good cause
31 and may specify terms and conditions for such discovery.

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

35 ***(A) Privileged information withheld.*** When a
36 party withholds information otherwise discoverable
37 under these rules by claiming that it is privileged or
38 subject to protection as trial preparation material, the
39 party shall make the claim expressly and shall describe
40 the nature of the documents, communications, or

41 things not produced or disclosed in a manner that,
42 without revealing information itself privileged or
43 protected, will enable other parties to assess the
44 applicability of the privilege or protection.

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

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8 FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

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

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

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

10 FEDERAL RULES OF CIVIL PROCEDURE

87 The attorneys of record and all unrepresented parties that
88 have appeared in the case are jointly responsible for arranging the
89 conference, for attempting in good faith to agree on the proposed
90 discovery plan, and for submitting to the court within 14 days after
91 the conference a written report outlining the plan. A court may
92 order that the parties or attorneys attend the conference in person.
93 If necessary to comply with its expedited schedule for Rule 16(b)
94 conferences, a court may by local rule (i) require that the
95 conference between the parties occur fewer than 21 days before
96 the scheduling conference is held or a scheduling order is due
97 under Rule 16(b), and (ii) require that the written report outlining
98 the discovery plan be filed fewer than 14 days after the
99 conference between the parties, or excuse the parties from
100 submitting a written report and permit them to report orally on
101 their discovery plan at the Rule 16(b) conference.

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Committee Note

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address some of the distinctive features of electronically stored information, including the volume of that information, the variety of locations in which it might be found, and the difficulty of locating, retrieving, and producing certain electronically stored information. Many parties have significant quantities of electronically stored information that can be located, retrieved, or reviewed only with very substantial effort or expense. For example, some information may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes. Time-consuming and costly restoration of the data may be required and it may not be organized in a way that permits searching for information relevant to the action. Some information may be “legacy” data retained in obsolete systems; such data is no longer used and may be costly and burdensome to restore and retrieve. Other information may have been deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques, even though technology may provide the capability to retrieve and produce it through extraordinary efforts. Ordinarily such information would not be considered reasonably accessible.

In many instances, the volume of potentially responsive information that is reasonably accessible will be very large, and the effort and extra expense needed to obtain additional information may be substantial. The rule addresses this concern by providing that a responding party need not provide electronically stored information that it identifies as not reasonably accessible. If the requesting party moves to compel additional discovery under Rule 37(a), the responding party must show that the information is not reasonably accessible. Even if the information is not reasonably

accessible, the court may nevertheless order discovery for good cause, subject to the provisions of Rule 26(b)(2)(i), (ii), and (iii).

The *Manual for Complex Litigation* (4th) § 11.446 illustrates the problems of volume that can arise with electronically stored information:

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

With volumes of these dimensions, it is sensible to limit discovery to that which is within Rule 26(b)(1) and reasonably accessible, unless a court orders broader discovery based on a showing of good cause.

Whether given information is “reasonably accessible” may depend on a variety of circumstances. One referent would be whether the party itself routinely accesses or uses the information. If the party routinely uses the information—sometimes called “active data”—the information would ordinarily be considered reasonably accessible. The fact that the party does not routinely access the information does not necessarily mean that access requires substantial effort or cost.

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.

The amendment to Rule 26(b)(2) excuses a party responding to a discovery request from providing electronically stored information on the ground that it is not reasonably accessible. The responding party must identify the information it is neither reviewing nor producing on this ground. The specificity the responding party must use in identifying such electronically stored information will vary with the circumstances of the case. For example, the responding party may describe a certain type of information, such as information stored solely for disaster recovery purposes. In other cases, the difficulty of accessing the information—as with “legacy” data stored on obsolete systems—can be described. The goal is to inform the requesting party that some requested information has not been reviewed or provided on the ground that it is not reasonably accessible, the nature of this information, and the basis for the responding party’s contention that it is not reasonably accessible. But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information.

If the requesting party moves to compel discovery, the responding party must show that the information sought is not reasonably accessible to invoke this rule. Such a motion would provide the occasion for the court to determine whether the information is reasonably accessible; if it is, this rule does not limit discovery, although other limitations—such as those in Rule 26(b)(2)(i), (ii), and (iii)—may apply. Similarly, if the responding party sought to be relieved from providing such information, as on a motion under Rule 26(c), it would have to demonstrate that the information is not reasonably accessible to invoke the protections of this rule.

The rule recognizes that, as with any discovery, the court may impose appropriate terms and conditions. Examples include sampling electronically stored information to gauge the likelihood that relevant information will be obtained, the importance of that information, and the burdens and costs of production; limits on the amount of information to be produced; and provisions regarding the cost of production.

When the responding party demonstrates that the information is not reasonably accessible, the court may nevertheless order discovery if the requesting party shows good cause. The good-cause analysis would balance the requesting party's need for the information and the burden on the responding party. Courts addressing such concerns have properly referred to the limitations in Rule 26(b)(2)(i), (ii), and (iii) for guidance in deciding when and whether the effort involved in obtaining such information is warranted. Thus *Manual for Complex Litigation* (4th) § 11.446 invokes Rule 26(b)(2), stating that "the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems." It adds: "More expensive forms of production, such as production of word-processing files with all associated metadata or production of data in specified nonstandard format, should be conditioned upon a showing of need or sharing expenses."

The proper application of those principles can be developed through judicial decisions in specific situations. Caselaw has already begun to develop principles for making such determinations. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002); *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001). Courts will adapt the principles of Rule 26(b)(2) to the specific circumstances of each case.

Subdivision (b)(5). The Committee has repeatedly been advised that privilege waiver, and the review required to avoid it, add to the costs and delay of discovery. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on grounds of privilege to make a privilege claim so that the requesting party can contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide 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.

Rule 26(b)(5)(B) does not address whether there has been a privilege waiver. Rule 26(f) is amended to direct the parties to discuss privilege issues in their discovery plan, and Rule 16(b) is amended to alert the court to consider a case-management order to provide for protection against waiver of privilege. Orders entered under Rule 16(b)(6) may bear on whether a waiver has occurred. In addition, the courts have developed principles for determining whether waiver results from inadvertent production of privileged information. *See* 8 Fed. Prac. & Pro. § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for addressing these issues.

Under Rule 26(b)(5)(B), a party that has produced privileged information must notify the parties who received the information of its claim of privilege within a “reasonable time.” Many 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.

The rule does not prescribe a particular method of notice. As with the question whether notice has been given in a reasonable time, the manner of notice should depend on the circumstances of the case. In many cases informal but very rapid and effective means of asserting a privilege claim as to produced information, followed by more formal notice, would be reasonable. Whatever the method, the notice should be as specific as possible about the information claimed to be privileged, and about the producing party's desire that the information be promptly returned, sequestered, or destroyed.

Each party that received the information must promptly return, sequester, or destroy it on being notified. The option of sequestering or destroying the information is included because the receiving party may have incorporated some of the information in protected trial-preparation materials. After receiving notice, a party must not use, disclose, or disseminate the information pending resolution of the privilege claim. A party that has disclosed or provided the information to a nonparty before receiving notice should attempt to obtain the return of the information or arrange for it to be destroyed.

Whether the information is returned or not, the producing party must assert its privilege in compliance with Rule 26(b)(5)(A) and preserve the information pending the court's ruling on whether the privilege is properly asserted and whether it was waived. As with claims of privilege made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

If the party that received the information contends that it is not privileged, or that the privilege has been waived, it may present the issue to the court by moving to compel production of the information.

Subdivision (f). Early attention to managing discovery of electronically stored information can be important. Rule 26(f) is amended to direct the parties to discuss these subjects during their discovery-planning conference. *See Manual for Complex Litigation (4th) § 11.446* (“The judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case. . . .”). The rule focuses on “issues related to disclosure or discovery of electronically stored information”; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, 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.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties’ information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party’s computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation (4th) § 40.25(2)* (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be

sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2). The form or format in which a party keeps such information may be considered, as well as the form in which it might be produced. "Early agreement between the parties regarding the forms of production will help eliminate waste and duplication." *Manual for Complex Litigation* (4th) § 11.446. Even if there is no agreement, discussion of this topic may prove useful. Rule 34(b) is amended to permit a party to specify the form in which it wants electronically stored information produced. An informed request is more likely to avoid difficulties than one made without adequate information.

Form 35 is also amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court. Any aspects of disclosing or discovering electronically stored information discussed under Rule 26(f) may be included in the report to the court. Any that call for court action, such as the extent of the search for information, directions on evidence preservation, or cost allocation, should be included. The court may then address the topic in its Rule 16(b) order.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations. *Cf. Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order

may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.”) Rule 37(f) addresses these issues by limiting sanctions for loss of electronically stored information due to the routine operation of a party’s electronic information system. The parties’ discussion should aim toward specific provisions, balancing the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business. Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted. Failure to attend to these issues early in the litigation increases uncertainty and raises a risk of later unproductive controversy. Although these issues have great importance with regard to electronically stored information, they are also important with hard copy and other tangible evidence. Accordingly, the rule change should prompt discussion about preservation of all evidence, not just electronically stored information.

Rule 26(f) is also amended to provide that the discovery plan may include any agreement that the court enter a case-management order facilitating discovery by protecting against privilege waiver. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege are often difficult to identify, and failure to withhold even one such item may result in waiver of privilege as to all other privileged materials on that subject matter. Not only may this effort impose substantial costs on the party producing the material, but the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems can become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information poses particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic document files but not apparent to the creator of the document or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic document file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic document (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

The Manual for Complex Litigation notes these difficulties:

A responding party’s screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate to a “nonwaiver” agreement, which they can adopt as a case-management order.

Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to “take back” inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Manual for Complex Litigation (4th) § 11.446.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide requested materials for initial examination without waiving any privilege—sometimes known as a “quick peek.” The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements—sometimes called “clawback agreements”—providing that production without intent to waive privilege should not be a waiver so long as the producing party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation.

As noted in the *Manual for Complex Litigation*, these agreements can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and reducing the cost and burden of review by the producing party. As the *Manual* also notes, a case-management order implementing such agreements can further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent

privilege forfeiture or waiver that the parties have reached, and Rule 16(b) is amended to emphasize the court's entry of an order recognizing and implementing such an agreement as a case-management order. The amendment to Rule 26(f) is modest; the entry of such a case-management order merely implements the parties' agreement. But if the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to provide an additional protection against privilege waiver by establishing a procedure for assertion of privilege after production, leaving the question of waiver to later determination by the court if production is still sought.

Rule 33. Interrogatories to Parties

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2 **(d) Option to Produce Business Records.** Where the answer
3 to an interrogatory may be derived or ascertained from the
4 business records, including electronically stored information, of the
5 party upon whom the interrogatory has been served or from an
6 examination, audit or inspection of such business records,
7 including a compilation, abstract or summary thereof, and the
8 burden of deriving or ascertaining the answer is substantially the