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## Only Yesterday: Reflections on Rulemaking Responses to E-Discovery

Richard Marcus

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## Only Yesterday: Reflections on Rulemaking Responses to E-Discovery

### Cover Page Footnote

Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law; Special Reporter to the Discovery Subcommittee of the Judicial Conference Advisory Committee on Civil Rules, 1996-present. This Essay is based on the remarks I made at the beginning of the E-discovery Conference, with the addition of some details and some supporting authority.

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## ESSAY

### THE PHILIP D. REED LECTURE SERIES

## ONLY YESTERDAY: REFLECTIONS ON RULEMAKING RESPONSES TO E-DISCOVERY

*Richard Marcus\**

### INTRODUCTION

I take my theme for introducing e-discovery issues from Frederick Lewis Allen, a popular historian of American social trends who in 1931 published a book entitled *Only Yesterday*. The book chronicles the remarkable shifts in American society between the end of World War I in 1918 and the stock market crash in 1929.<sup>1</sup> My reason is that “only yesterday” we did not have to worry about discovery of electronically-stored materials (“e-discovery”).

The shift from a decade ago to now is quite striking. For example, in a 1997 case against Prudential Insurance Company, a challenge was made to Prudential’s compliance with the judge’s directive that pertinent materials not be discarded. Prudential communicated the judge’s order to its agents by e-mail, which would strike us today as obviously sensible. But then—only yesterday—sixty percent of the agents did not have e-mail, and many of those who did were unable to use it.<sup>2</sup> Undoubtedly, things have changed a great deal in a short time.

Allen’s 1931 book was a best seller, and he continued to write in the same vein, including a 1952 book entitled *The Big Change* that examined the changes in American society between 1900 and 1950.<sup>3</sup> The very first big change that Allen noted in that book was technological—the replacement of horses by cars<sup>4</sup>—and the book

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1. Frederick Lewis Allen, *Only Yesterday* (1931).  
2. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 604 (D.N.J. 1997).

3. Frederick Lewis Allen, *The Big Change* (1952).

4. *Id.* at 6-8.

repeatedly linked changes in American society to technological innovations.<sup>5</sup>

In this introduction to our conference, I hope to identify the big changes against which the recent emergence of e-discovery can be evaluated as we consider whether the Federal Rules of Civil Procedure (“Civil Rules”) should be amended to cope with the new challenges of e-discovery. After examining those big changes, I will describe the manner in which the Judicial Conference Advisory Committee on Civil Rules (“Advisory Committee”) has approached the topic, and offer reflections on the reasons for treating e-discovery as distinctive. Lastly, I will propose caution about the possibility that rule changes will assuage all the concerns that have been raised about this form of discovery.

## I. THE BIG CHANGES

There are actually three big changes that are pertinent to the current consideration of e-discovery. The first happened in 1938, when the Civil Rules went into effect. All of us know generally that those Rules expanded discovery opportunities compared to what went before. Only yesterday did many of us begin to appreciate how dramatic this change really was.

### A. *Big Change Number 1—The Discovery Revolution*

During the last conference on discovery held by the Advisory Committee, in Boston in 1997, Professor Stephen Subrin explored the background against which the Rules were adopted.<sup>6</sup> Before 1938, many states had broader discovery provisions than the federal system,<sup>7</sup> but the new Rules changed all that. As Subrin recognized, the Civil Rules’ package was truly “revolutionary”;<sup>8</sup> they “went farther than any single system anywhere.”<sup>9</sup> The Discovery Rules were drafted by Edson Sunderland of the University of Michigan, who did not hide what he was doing:

Sunderland frankly told the Advisory Committee that he did not have precedent for the combination of liberalized discovery that he

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5. See, e.g., *id.* at 14-15 (“There was little electric street-lighting; a commonplace sight at dusk in almost any American city was the appearance of the city lamplighter with his ladder . . .”); *id.* at 19 (reporting that electrical services and devices like home appliances were relatively unknown); *id.* at 22 (“Telephones, in 1900, were clumsy things and comparatively scarce. . . . There would be no radio for another twenty years; no television . . . for over forty-five years.”); *id.* (stating that the first movie that told a story had not been made).

6. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. Rev. 691 (1998).

7. *Id.* at 701.

8. See *id.* at 734 (referring to “the discovery revolution begun by the Federal Rules”).

9. *Id.* at 726.

had drafted. If one adds up all of the types of discovery permitted in individual state courts, one finds some precursors to what later became discovery under the Federal Rules; but at the time Sunderland drafted what became the federal discovery rules, no one state allowed the total panoply of devices. Moreover, the Federal Rules, as they became law in 1938, eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.<sup>10</sup>

But there were still some limitations on discovery in federal court even after 1938. For example, under the 1938 Civil Rules, document requests required advance court approval. Further changes in the Civil Rules, particularly an extensive revision that went into effect in 1970, relaxed those remaining constraints. By that time, American discovery had become unique in the world; indeed, Professor Subrin recently explored a global perspective on U.S. discovery in an article entitled, in part, *Are We Nuts?*<sup>11</sup> Suffice it to say that U.S. discovery is a cornerstone of our nation's commitment to private enforcement of the law.<sup>12</sup> Professor Hazard, for example, concludes that "[b]road discovery is thus not a mere procedural rule. Rather it has become, at least in our era, a procedural institution perhaps of virtually constitutional foundation."<sup>13</sup> Overall, broad discovery is a big change that must be considered by any who seek rule changes to respond to the challenges of e-discovery.

### B. *Big Change Number 2—Technological Breakthroughs Mold Society*

The second big change resulted from technological breakthroughs like the ones Allen examined when dealing with the first half of the twentieth century. Those of us who were born after Allen wrote about big changes have seen at least as many technological changes as he chronicled, and have seen them alter American society as much as the ones he cited.

Consider what the last decade or so has brought: instant messaging, blackberries, cell phones, and e-mail, as well as general use of the

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10. *Id.* at 719 (internal citations omitted).

11. Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DePaul L. Rev. 299 (2002).

12. A well-known statement of this view comes from Judge Higginbotham, a former Chair of the Advisory Committee on Civil Rules:

Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.

Patrick Higginbotham, *Foreword*, 49 Ala. L. Rev. 1, 4-5 (1997).

13. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1694 (1998).

Internet in homes and offices. The variety of ways in which these developments have changed society is still being explored. At a minimum, these innovations seem to have effected a transformation in various social interactions, some, perhaps, for the better. For our purposes, however, the pertinent focus is on litigation. Consider how greatly these developments have affected the way in which litigation is handled. What lawyer would feel that she could adequately represent her clients in the twenty-first century without using these devices that were unavailable only yesterday?

Looking further into the past, the variety of changes that affected law practice is greater. Focusing on 1938, when the Civil Rules went into effect, we can see that the litany of missing items is little short of astonishing. Fax machines came into general use only in the late 1980s. Personal computers did not become generally available until the early 1980s. Word processing arrived a half decade before that, albeit only under the ministrations of secretarial staff (not individual lawyers) until the personal computer arrived. Further back, yet within some lawyers' lifetimes, the electric typewriter did not exist, direct dial long distance telephone calls could not be made, and commercial jet travel was unknown or rare. Most significant of all for discovery (until the advent of e-discovery), the photocopier did not come into general use until the 1950s, and the notion that it would create copies that are as good as originals<sup>14</sup> lay well in the future then.

Altogether, from the perspective of technological reality at the time the framers of the Civil Rules embarked on their revolutionary course, there has been a big change in the way litigators practice their trade. And yet the technology revolution—Big Change Number 2—has not before prompted rule changes to cope with its effects. The photocopier greatly increased the amount of material that could be sought under Rule 34. The most significant changes to that Rule in 1970, however, were to remove the requirement that there be court approval for document requests and to expand the definition of documents to include “data compilations,” the foundation for contemporary discovery of electronically stored material.<sup>15</sup> But that does not mean that the relatively unconstrained 1970 theme of unlimited discovery has remained unchanged.

### *C. Big Change Number 3—Discovery Retrenchment*

To the contrary, Big Change Number 3 was a reaction to Big Change Number 1. Soon after the Discovery Rules reached their zenith of aggressiveness in 1970, voices were frequently heard

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14. See Fed. R. Evid. 1001(f) (defining “duplicate” as one made “by means of photography”); Fed. R. Evid. 1003 (providing that a “duplicate” is ordinarily admissible to the same extent as the original).

15. See Fed. R. Civ. P. 34(a) advisory committee’s note (1970).

decriing the effects of overdiscovery. By the mid-1970s, these voices had reached a sufficient pitch to form a central theme of the Pound Conference in 1976, an event held in recognition of Roscoe Pound's famous speech to the American Bar Association in 1906 championing reform of American litigation.<sup>16</sup>

The themes of the 1930s era of expansion of discovery revolved around eliminating trial by surprise and promoting results based on the merits. The themes of the discovery controversies beginning in the 1970s sound much more familiar to contemporary ears. Discovery cost too much, many said, and produced too little. Too often responding parties had to make huge efforts to respond to discovery requests, only to find that few, if any, of the materials produced so laboriously ever surfaced in the case. Sometimes it seemed that the other side did not even bother to read them. But parties seeking discovery urged that they were the victims of hide-the-ball stonewalling tactics and, alternatively, dump-truck tactics that inundated them in irrelevant material.<sup>17</sup>

This controversy put the Discovery Rules on the Advisory Committee's agenda almost continuously for nearly a quarter century. Beginning in 1978, rule changes were proposed to contain or curtail discovery and also to prevent abusive behavior by those responding to discovery. The Discovery Rules were amended in 1980, 1983, 1991, 1993, and 2000. This is a history of strikingly frequent rule changes. Compare the class action rule, which has also generated controversy. After it was revised in 1966, it was not further amended at all until December 2003.<sup>18</sup>

The resulting rule revisions are far too numerous to list here, but some merit note:

- Rule 26(g) was amended to make signatures on discovery papers a warrant for their legitimacy like the certification that Rule 11 implies for signatures on other documents.<sup>19</sup>
- Rule 34(b) was amended to require that documents be produced in the order requested or in the order maintained

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16. See Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D. 79 (1976).

17. For a review of this debate, see generally Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. Rev. 747 (1998).

18. In 1998, Rule 23(f) was added to authorize interlocutory appeals of class certification decisions, but that change did not affect any of the directives about conduct of class actions. See Fed. R. Civ. P. 23(f) advisory committee's note (discussing 1998 amendment). In 2003, amendments to Rule 23(c) and (e), and the addition of new Rules 23(g) and (h), altered the rule provisions dealing with the conduct of class actions. See Fed. R. Civ. P. 23(c), (e), (g), (h) advisory committee's notes (discussing 2003 amendment). But no amendment yet has changed the criteria for allowing cases to be certified as class actions.

19. See Fed. R. Civ. P. 26(g); Fed. R. Civ. P. 26(g) advisory committee's note (discussing 1983 amendment); see also Fed. R. Civ. P. 11.

by the producing party to prevent “hiding” of important documents among unimportant ones.<sup>20</sup>

- Rules 26(d) and (f) forbid formal discovery until the parties confer about a discovery plan that is to be submitted to the court under Rule 16(b).<sup>21</sup>
- Rule 26(a) was added to require various disclosures without the need for formal discovery requests<sup>22</sup> and Rule 37(c)(1) was added to give teeth to those requirements.<sup>23</sup>
- Rule 26(e) was fortified to require supplementation of disclosures and discovery responses much more frequently than had been true before.<sup>24</sup>
- Rule 30(d) was changed to prohibit such abusive tactics during depositions as “speaking objections” and to forbid instructions not to answer except in limited circumstances.<sup>25</sup>
- Numerical limitations were imposed on interrogatories and depositions and a time limit was imposed on depositions.<sup>26</sup>
- Where the Discovery Rules had formerly invited unlimited discovery if a party so desired, that invitation was removed, and the “proportionality” provisions now in Rule 26(b)(2) were added.<sup>27</sup>

Taken together, these changes may be seen as completing a “cultural cycle in American procedural reform.”<sup>28</sup> The addition of the proportionality provisions, in particular, may have ushered in a new era of limits for discovery. Arthur Miller, the Advisory Committee Reporter when the proportionality provisions were added, described them in 1983 as a “180 degree shift” in orientation in the Discovery Rules.<sup>29</sup> Shortly thereafter, Magistrate Judge Wayne Brazil sang their praises in the new orientation in a 1985 opinion because the

20. See Fed. R. Civ. P. 34(b); Fed. R. Civ. P. 34(b) advisory committee’s note (discussing 1980 amendment).

21. See Fed. R. Civ. P. 26(d), (f); Fed. R. Civ. P. 26(d) advisory committee’s note (discussing 1993 amendment); Fed. R. Civ. P. 26(f) advisory committee’s note (discussing 1980 and 1993 amendments).

22. See Fed. R. Civ. P. 26(a); Fed. R. Civ. P. 26(a) advisory committee’s note (discussing 1993 amendment).

23. See Fed. R. Civ. P. 37(c)(1); Fed. R. Civ. P. 37(c)(1) advisory committee’s note (discussing 1993 amendment).

24. See Fed. R. Civ. P. 26(e); Fed. R. Civ. P. 26(e) advisory committee’s note (discussing 1993 amendment).

25. See Fed. R. Civ. P. 30(d); Fed. R. Civ. P. 30(d) advisory committee’s note (discussing 1993 amendment).

26. See Fed. R. Civ. P. 30(a)(2)(A), (d)(2), 33(a); see also Fed. R. Civ. P. 30(a)(2)(A), (d)(2), 33(a) advisory committee’s notes (discussing 1993 amendments).

27. See Fed. R. Civ. P. 26(b)(2); Fed. R. Civ. P. 26(b)(2) advisory committee’s note (discussing 1993 amendment).

28. Marcus, *supra* note 17, at 748.

29. Arthur R. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* 32-33 (1984).



amendments “superimpos[e] the concept of proportionality on all behavior in the discovery arena.”<sup>30</sup> But experience has shown that this early enthusiasm was overstated.<sup>31</sup>

Overall, Big Change Number 3 represents a significant retrenchment from the broadest views of discovery that emerged in the 1960s. At the same time, it is important to appreciate that there was no renunciation of the basic idea of broad discovery, or the general notion that the responding party cannot force the other side to pay the cost of discovery.<sup>32</sup>

## II. THE ADVISORY COMMITTEE ENCOUNTERS E-DISCOVERY

As the last (or at least most recent) phase of the “cultural cycle” of discovery containment mentioned above,<sup>33</sup> the Advisory Committee embarked in 1996 on its Discovery Project. That project began as a comprehensive examination of all known discovery topics, aiming to evaluate possible rule changes. A critical component of that effort consisted of events like this conference, during which lawyers told the Advisory Committee about their concerns. Needless to say, the Advisory Committee had something of a foretaste about what subjects were likely to arise, and that foretaste was accurate in the sense that the expected views and concerns did, by and large, emerge.

But there was one new and unanticipated topic. Repeatedly, lawyers brought up something none of us had thought about—or even heard of—before. Electronic discovery, we were told, was the really big new issue. The cost of this new form of discovery could be enormous. The effort involved in finding the materials sought could be amazing, particularly if one wanted to locate items on backup tapes or, worse yet, find things that had been “deleted” but were still on a hard drive. And the returns of this effort were often meager. Beyond that, judges too often seemed obtuse about the real issues involved. Either they thought that because computers were involved it would be simple to find everything by pushing a button, or they believed that using computers constituted a voluntary excursion by parties into new technology for which they had to pay the resulting price. Many argued that the rule makers should do something about these problems.

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30. *In re Convergent Tech. Sec. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985).

31. Thus, Judge Higginbotham reflected as follows in 1997: “The proportionality language added to the Federal Rule of Civil Procedure 26 was thought to be a major reform. Few would now contend that this hard fought change had effect.” Higginbotham, *supra* note 12, at 4.

32. For an examination of this point, see Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tul. J. Int’l & Comp. L. 153, 182-96 (1999) (concluding that there is still a great divide between the American approach and that employed in other countries).

33. See *supra* note 28 and accompanying text.

At first blush, it was tempting to react that something already *had* been done. After all, Big Change Number 3 reacted to complaints about discovery, beginning in the 1970s, that sounded very much like the sorts of complaints that emerged in the late 1990s about e-discovery: it cost too much, took too much effort, and produced too little. It should not be surprising that the rule makers, having just spent a quarter century refining the Discovery Rules to constrain discovery, would think that they had already dealt with these problems and did not have to do so a second time merely because a new technology had emerged. Recall that there were no special rules added to deal with the discovery challenges produced by the introduction of photocopiers; why would we need more with regard to computers? After all, the addition of the Rule 26(b)(2) proportionality factors seemed to address many of the concerns with e-discovery, and the 2000 amendments placed added stress on Rule 26(b)(2).<sup>34</sup>

And it is also worth recognizing that considerable strength remains for this view. Consider, for example, the views of a thoughtful judge dealing with an e-discovery problem in late 2003: “[I]t also can be argued with some force that the Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records.”<sup>35</sup> The judge added:

Under Rules 26(b)(2) and 26(c), a court is provided abundant resources to tailor discovery requests to avoid unfair burden or expense and yet assure fair disclosure of important information. The options available are limited only by the court’s own imagination and the quality and quantity of the factual information provided by the parties to be used by the court in evaluating the Rule 26(b)(2) factors.<sup>36</sup>

Unfamiliarity also played a role in the Committee’s cautious approach to e-discovery. The law of unintended consequences is one that should be on rule makers’ minds. To venture into formulating rules on a subject that is not entirely familiar would invite trouble on that front. Not only was the topic unfamiliar, but it seemed to be changing rapidly and constantly. Perhaps partly for that reason, it was quite unclear what rule-based solutions might be helpful. Thus, no provisions in the 2000 Discovery Rule amendments were tailored to the problems raised by e-discovery.

Beginning in 2000, the Advisory Committee’s Discovery Subcommittee (“Subcommittee”) turned to a closer examination of e-discovery. Besides careful examination of the literature on the

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34. See Fed. R. Civ. P. 26(b)(1) (reminding lawyers and judges that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)”).

35. *Thompson v. United States Dep’t of Hous. and Urban Dev.*, 219 F.R.D. 93, 98 (D. Md. 2003).

36. *Id.* at 98-99.

subject, it embarked on an effort to obtain some empirical information about the topic through an online survey of magistrate judges about their experiences dealing with e-discovery problems. During 2000, the Subcommittee also convened two mini-conferences on the subject—one in San Francisco and the other in Brooklyn. These efforts provided considerably more insight into e-discovery than the introductory encounter in 1997-1998, but did not necessarily point the way toward rulemaking solutions. For one thing, the velocity of technological change had not slowed. For another, many knowledgeable observers thought that rule changes would not be a helpful way of addressing the issues.

In the fall of 2002, the Subcommittee returned to the topic, inviting comments from the bar on possible rulemaking.<sup>37</sup> It then resolved, during 2003, to try to devise rule-change language that could be used as a concrete basis for discussion of possible amendment ideas. This effort yielded the seven discussion points addressed during the Fordham conference on February 20th and 21st: (1) defining e-discovery in Rule 26; (2) including e-discovery as an issue in discovery planning under Rule 26(f); (3) revising the definition of document in Rule 34(a); (4) addressing the form of production of electronically-stored information in Rule 34, and perhaps also Rule 33; (5) providing explicit guidance about the responding party's burden in retrieving "inaccessible" electronically-stored materials; (6) adding rule provisions to deal with the problem of privilege waiver or forfeiture; and (7) addressing the problems of preservation of electronically-stored information and a safe harbor against sanctions for failure to preserve.

This initial distillation of issues reflected the work done since 2000; it is not at all clear that an effort to identify the most salient possible amendments in 1998 or 1999 would have yielded the same list. It was also a tentative undertaking; there is every reason to expect that the listing of suitable amendment ideas will continue to evolve. But if rulemaking is to be done, it has to start somewhere, and this conference can inform the rule makers about how to proceed from this point.

### III. REFLECTIONS ON THE FUTURE OF E-DISCOVERY

Against that background, we turn to the question of where to go from here. Simply posing this question at this conference suggests the Advisory Committee is tacitly adhering to what might be called the "new prototype" of rulemaking. Once, the process of rule

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37. See Letter from Richard L. Marcus, Horace O. Coil ('57) Chair in Litigation, Hastings College of the Law, to E-discovery Enthusiasts (Sept. 2002) (on file with author). This letter was sent to over 200 lawyers across the country who had been involved in activities indicating an interest in the subject.

amendment occurred behind tightly closed doors,<sup>38</sup> but Congress significantly changed the landscape in 1988 by amending the Rules Enabling Act<sup>39</sup> to require that there be public access to the process. Beginning in the mid-1990s, the Advisory Committee has made it a practice to inform itself about rules issues by seeking input from the bar. Conferences such as this one play a central role in that effort.

This learning effort produces tentative insights that inform the later learning process, so it seems worthwhile to share some insights that seem to me to emerge from what we have seen to date.

#### A. *E-Discovery Issues Are Not Going to Disappear*

In the information age, the computer is at the center of many features of life. For example, we learned that Iraq had some unsuccessful dealings on weapons with North Korea because of computer sleuthing.<sup>41</sup> Recent high-profile prosecutions confirm the centrality of electronic evidence. Just limiting attention to those in Manhattan, one is reminded of both the cases of Martha Stewart<sup>42</sup> and Frank Quattrone.<sup>43</sup>

But the rules at issue here are the Civil Rules, and at least an equal reliance of electronically-stored materials will develop in civil cases. Consider first the widespread assertion that over ninety percent of the “information” developed by corporations and governmental agencies is presently electronic and never put into hard copy form.<sup>44</sup> In the

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38. Thus, Paul Carrington, the Reporter of the Advisory Committee on Civil Rules from 1985 to 1992, reported that “one of my predecessors, the late Al Sacks, . . . was instructed to keep his work entirely under wraps until the committee was prepared to make a recommendation.” Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 *Judicature* 161, 164 (1991).

39. See 28 U.S.C. § 2073(c) (2000) (directing that all meetings of rules committees be public after appropriate notice).

41. See David E. Sanger & Thom Shanker, *For the Iraqis, A Missile Deal That Went Sour; Files Tell of Talks with North Korea*, N.Y. Times, Dec. 1, 2003, at A11 (reporting that this insight was gleaned from “computer files discovered by international inspectors”).

42. See *United States v. Stewart*, 287 F. Supp. 2d 461, 464 (S.D.N.Y. 2003) (holding that Martha Stewart waived the attorney-client privilege by forwarding to her daughter a copy of an e-mail she sent to her lawyer); see also Constance L. Hays, *Stewart Trial Focuses on Message From Broker*, N.Y. Times, Feb. 11, 2004, at C1 (describing Stewart’s deletion of part of the computerized record of a phone message from her stock broker).

43. See Randall Smith & Kara Scannell, *In Landmark Quattrone Trial, New Momentum for Prosecution*, Wall. St. J., Oct. 13, 2003, at A1 (describing the prosecution’s claim that an e-mail “showed unlawful intent by Mr. Quattrone”).

44. See, e.g., Patrick J. Burke & Daniel M. Kummer, *Controlling Discovery Costs*, Legal Times, Aug. 18, 2003, at 19 (asserting that “93 percent of business documents are created electronically; most are never printed”).

future (if not the present) we may expect the “paperless” office. In that setting, what else can civil discovery pursue but electronically-stored materials? The centrality of computers to organizations cannot be overstated. Consider how paralyzing it is for any business or governmental agency to experience a computer failure; things simply cannot work. Although some courts once seemed to think that using computers was optional, as Judge Facciolla recognized, that is no longer the case even if it once was:

The one judicial rationale that has emerged is that producing backup tapes is a cost of doing business in the computer age. But, that assumes an alternative. It is impossible to walk ten feet into the office of a private business or government agency without seeing a network computer, which is on a server, which, in turn, is being backed up on tape (or some other media) on a daily, weekly, or monthly basis. What alternative is there? Quill pens?<sup>45</sup>

This new reality must affect civil trials and discovery in civil cases. At least some arms of government seem to recognize this reality already. The Securities and Exchange Commission, for example, requires the preservation of certain e-mail information.<sup>46</sup> Failure to retain e-mail can lead to serious fines.<sup>47</sup> And lawyers have surely awakened to the importance of this source of information in recent years. Indeed, one measure of the importance of this new realm of discovery is the frequency of continuing legal education programs about it. The Federal Judicial Center has been monitoring such programs to assist the Advisory Committee in this rulemaking effort, and has found that they have occurred at the rate of about two per week over the last three years.<sup>48</sup> As one specialist in the area said recently, “the document production of 2003 bears little resemblance to that of the 1980s and 1990s.”<sup>49</sup> Only yesterday things were different, but tomorrow they will not be. And it may be that we have yet to plumb the depths of utility of computerized information.<sup>50</sup>

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45. *McPeck v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001) (citations omitted).

46. See 17 C.F.R. § 240.17a-4 (2003) (requiring retention for three years of all communications sent or received by any broker or dealer in securities).

47. See Patrick McGeehan, *E-Mail Gaps May Mean Fines for Big Firms*, N.Y. Times, Aug. 2, 2002, at C4 (reporting that the Securities and Exchange Commission proposed fines of ten million dollars for failure to keep e-mail messages as required).

48. The FJC has compiled this information for use by members of the Advisory Committee, but not released it for general public access. E-mail from Kenneth Withers, Federal Judicial Center, to author (Aug. 30, 2004).

49. David Horrigan, *Producing Those Documents*, Nat'l L.J., Mar. 17, 2003, at C3; see also Ellen Byron, *Computer Forensics Sleuths Help Find Fraud*, Wall. St. J., Mar. 18, 2003, at B1 (quoting a vendor as saying: “Within three years, I’m sure almost all evidence collected in discovery will be electronic-based”).

50. One source that many might overlook is a building security system, yet such a system may yield information critical to a civil case. For example, in a case involving computer sabotage by an employee, critical information was gleaned from the building access control system, to show that the employee was present at the time of the sabotage and to show that the telephone on the employee’s desk was in use at the

### B. *E-Discovery Is Different*

The point where quantitative differences become qualitative is hard to identify, but it does exist. The quantity of material that is stored electronically is staggering,<sup>51</sup> and may well increase. Most likely, so much is stored because, in some senses, storage costs very little. In any event, one does not have to look far to find descriptions of discovery challenges of the electronic age that may startle even hardened veterans of the hard copy age. Consider the following description:

In the author's own experience, a complex litigation between two large corporate parties can generate the equivalent of more than one hundred million pages of discovery documents, requiring over twenty terabytes of server storage space. Assuming a review rate of one box of paper documents per weekday, per reviewer, a one hundred million page volume corresponds to over thirty person-years of review for each party. In ecological terms, each side would require approximately 6,250 trees just to print one copy of each of the documents it produced and of each of the documents it received.<sup>52</sup>

But quantity is not always the right measure of discovery burdens. As the Supreme Court long ago surmised, businesses use computerized record keeping in part because it is easier to retrieve information from electronic records.<sup>53</sup> Thus, on occasion courts may order that electronic records be searched while the burden of searching hard-copy records is too great.<sup>54</sup> A different distinctive

time of the sabotage. See Kristin M. Nimsgger & Alan E. Brill, *Looking Outside the Box*, Legal Times, Oct. 21, 2002, at 31.

51. Consider these introductory comments in the Manual for Complex Litigation: 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.

Fed. Judicial Ctr., Manual for Complex Litigation § 11.446 (4th ed. 2004).

52. Robert Douglas Brownstone, *Collaborative Navigation of the Stormy e-Discovery Seas*, 10 Rich. J.L. & Tech. 53, ¶ 21 (2004), at <http://law.richmond.edu/jolt/v10i5/article53.pdf> (internal citations omitted).

53. As the Supreme Court observed a quarter century ago:

[A]lthough it may be expensive to retrieve information stored in computers when no program yet exists for the particular job, there is no reason to think that the same information could be extracted any less expensively if the records were kept in less modern forms. Indeed, one might expect the reverse to be true, for otherwise computers would not have gained such widespread use in the storing and handling of information.

*Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 362 (1978).

54. See, e.g., *Hayes v. Compass Group USA, Inc.*, 202 F.R.D. 363, 366 (D. Conn. 2001) (requiring defendant employer to retrieve and provide information for which it

feature of computerized records is that often they consist of dynamic databases that “exist” only in the sense that they will provide responsive information when queried. Such databases are difficult to conceptualize as “documents” in the traditional way, and discovery about or from them blurs the distinction between Rule 33 interrogatories and Rule 34 document requests.

### *C. Preservation and Spoliation Are More Complex*

Another way in which e-discovery differs from other discovery is that issues of spoliation and preservation shift with computer-generated information. As we all know, “deleting” a file does not really discard it in the same way that throwing a hard copy document into the trash does. To the contrary, depending on the amount of effort spent, many such files can be retrieved. So discarding has changed. On the other hand, inadvertent destruction of potentially important information can occur. Merely turning on the computer can alter some data, as can any use of an electronic file. Reviewing a hard copy document, on the other hand, does not intrinsically alter it.

In part, this is because of the automatic creation by computer programs of various sorts of information that the user only dimly understands, if at all. In part, it is a result of different automatic operations of computers. These machines can be directed to implement a discard program, by date of creation or according to other criteria, and they will adhere to that program until stopped. It may be that sometimes this sort of purging is necessary to avoid overburdening even the massive storage capacities of computers. Put together with the automatic creation and alteration of various sorts of data, this feature highlights the distinctive preservation issues that arise in this area.

In the same vein, courts must tread lightly when approaching preservation questions to avoid crippling an institution that relies on computers for its operation. A simple “keep everything as it is” order could bring the organization to a halt.<sup>55</sup> And yet there are indications that some courts do enter such orders, sometimes even without permitting the affected entity to be heard.<sup>56</sup>

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had computer search capacity but not requiring the defendant to manually search its files for similar information).

55. For example, consider the following treatment:

Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, “no.” Such a rule would cripple large corporations . . . that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.

Zubulake v. UBS Warburg, L.L.C., 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

56. See Hester v. Bayer Corp., 206 F.R.D. 683, 684 (M.D. Ala. 2001) (state court entered ex parte order directing large corporation to “suspend all routine destruction

A misconception about preservation that creeps into this area bears emphasis: it does not follow from a duty to preserve that the preserved information is automatically subject to production without regard to issues of burden and relevance. All that preservation does is to ensure that a judge will be able to make that determination at a time when it can be put into effect if the justification for production seems sufficient.

#### D. *The Unfinished Business Temptation*

As noted above, Big Change Number 3 involved two decades of revision of the Federal Discovery Rules to constrain discovery.<sup>57</sup> Many who favored change urged more aggressive constraints. It should therefore not be surprising that some who urged change during that period thought that there had not been enough. For them, then, ongoing consideration of discovery reform has an unfinished business aspect.

There is a real temptation to relitigate these past amendment battles. It may be that cost-bearing discussions exhibit some aspects of this hangover effect. In many parts of the world, and among some in this country, the normal starting point that the responding party must pay for preparing the discovery response seems odd, or even backwards. Economic arguments can be deployed to show that the American way produces bad incentives. Indeed, more generally, the notion that the winning party must shoulder its own cost of litigation is peculiarly American.

At the same time, the American attitude toward cost-bearing is central to the American way of litigation. And Big Change Number 3 did not change that. So one must be wary of arguments about such things as burden with regard to e-discovery that invoke the same set of concerns that have been raised in the past regarding hard copy discovery, and sometimes appear to question the assumption that the producing party bears the burden of production. Perhaps e-discovery could precipitate a new paradigm for discovery in this country, but the present initiative is not intended to upend the current American approach.

#### E. *The Problems that Lie Elsewhere*

At least some of the problems that cause concern about e-discovery seem to be real problems, but not necessarily problems of discovery. Indeed, one could say that the problems exist in part because real life is not always handled in the way that litigators would prefer. At least

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of documents, including but not limited to, recycling back-up tapes, automated deletion of e-mail, and reformatting hard drives” (citation omitted)). The federal court vacated the order.

57. See *supra* Part I.C.



three problems have emerged over the last few years of Subcommittee consideration of these topics.

### 1. Loose Lips Sink Ships

In an article entitled *The Perils of E-mail*, Fortune magazine examined the fear produced by the insight that “e-mail [is] the corporate equivalent of DNA evidence.”<sup>58</sup> The Economist similarly reacted to “the dangers of e-mail,” which it explained as follows: “to put into a near-indestructible e-mail the sorts of comments you might give vent to round the water-cooler is to invite trouble.”<sup>59</sup> Reacting to this problem, Merrill Lynch is reportedly having its 50,000 employees attend a reeducation camp of sorts that teaches them to ask themselves a question before composing or sending e-mails: “How would I feel if this message appeared on the front page of a newspaper?”<sup>60</sup>

Without in any way doubting that organizations have legitimate concerns about what employees say in e-mail messages, I must say that this is not a problem that the Discovery Rules are likely to solve. To some extent, one could urge that locating such banter is not a high priority, and that the value of offhand comments might be debated if the cost of finding them were large. Yet in many types of cases it is difficult to see how one could treat such observations as irrelevant. In employment discrimination cases, for example, courts have recognized that “employers rarely leave a paper trail—or ‘smoking gun’—attesting to a discriminatory intent,” so that “plaintiffs often must build their cases from pieces of circumstantial evidence.”<sup>61</sup> Whether or not e-mail messages reflect little thought, limiting discovery of them on the ground they do not have any evidentiary value is not likely to appear sensible very often in such cases. So whatever solution there may be to the problems created by foolish statements in e-mails is unlikely to come from discovery reform.

### 2. The World’s Greatest Packrats

A prime example of a litigator’s headache is the information technology (“IT”) person who proudly shows that she has kept every smidgen of data the company ever generated or acquired. Among the gods of information management, this may be a sign of virtue. Among the litigators, it is likely not to be welcomed.

A sensible approach to keeping data must involve a balance among various positives and negatives. Using that approach, companies may

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58. Nicholas Varchaver, *The Perils of E-mail*, Fortune, Feb. 17, 2003, at 96, 96.

59. *Thunderstruck*, Economist, May 25, 2002, at 14, 14.

60. See Varchaver, *supra* note 58, at 96.

61. *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990).

develop sophisticated document preservation systems. But developing a system and implementing it are two different things. To the extent that the ethos of the IT personnel (or the engineers, or some other group) is to keep everything they can, it may turn out that there are huge quantities of electronic data that could be mined (sometimes at great cost) for whatever relevant content they may have. Real though that problem may often be, it is not a problem caused by the Discovery Rules, and it is not one that is likely to warrant a change in the Discovery Rules.

### 3. The Isolated Litigator

Outside counsel often find it difficult to learn enough about their clients to deal effectively with some issues early in the litigation, but this problem may assume particularly serious dimensions in relation to e-discovery. For it seems that some executives of companies often understand only dimly, or not at all, how their own information systems work and what information they produce. The details can easily surface well into the litigation, but by then critical time may have been lost.

We certainly have horrifying examples of this problem. In one case, for example, outside counsel assured the plaintiff and the court that certain types of information could not be obtained from defendant's systems.<sup>62</sup> The assurance was based on information provided by one of defendant's "senior executive[s]."<sup>63</sup> Yet a year later, the plaintiffs' deposition of a vice president in the defendant's MIS department revealed that the defendant's systems did indeed have the capability to track the information the plaintiffs had sought at the time the plaintiffs requested it, but that due to the passage of time since the request was first made (and the plaintiffs and the court were assured that obtaining the information was not possible), the information was no longer available.<sup>64</sup> The court sanctioned the defendant.<sup>65</sup>

This is surely a problem that should be solved by changes in behavior, but not so surely a problem that can be solved by rule. One could attempt a rule-based solution that requires lawyers to become fully conversant with their clients' computer systems at the outset of litigation. Indeed, at least two local rules seem to address these concerns.<sup>66</sup> But it may be that, for national rules, such a directive

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62. See *GTFM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 CIV. 7724, 2000 WL 335558, at \*2 (S.D.N.Y. Mar. 30, 2000).

63. *Id.*

64. *Id.*

65. *Id.* at \*3.

66. A New Jersey district court rule provides:

Prior to a Fed. R. Civ. P. 26(f) conference, counsel shall review with the client the client's information management systems including computer-based and other digital systems, in order to understand how information is

would be viewed as too intrusive.

#### F. *The Newness Problem*

E-discovery is new, and the breadth of use of computers is also relatively new. The expressions of concern about uncertainty that abound with regard to e-discovery are partly due to its newness. Clients do not know how to behave to comply with discovery and preservation obligations. Lawyers are not sure what to tell their clients to do. All await the decision of a judge in the future, and the judge will be acting in an area with few landmarks.

These concerns may provide a strong reason for developing rules that will guide both clients and judges. But there is also reason for caution. One reason is that rule makers who are dealing with new topics may not know enough about them, as mentioned above. Another reason is that the common law process of solving problems in the context of individual cases may reasonably be preferred to efforts at rule drafting that necessarily operate in a somewhat abstract or generalized environment. As one judge confronting e-discovery issues recently observed: “[L]ike snowflakes, no two litigations are alike, so a preservation order tailored to the particular issues of the lawsuit in question may best ensure a forthright and expeditious discovery process.”<sup>67</sup>

There are not many Civil Rules that provide the sort of specificity that some who decry uncertainty seek. Instead, they invoke terms like “reasonable” and “undue burden” that depend largely on the circumstances of the given case. Particularly with such a new topic, it is not likely that great certainty will come from rule changes if they do occur.

#### G. *The Pace of Technology Change*

In *The Big Change*, Allen repeatedly emphasized the ways in which

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stored and how it can be retrieved. To determine what must be disclosed pursuant to Fed. R. Civ. P. 26(a)(1), counsel shall further review with the client the client’s information files, including currently maintained computer files as well as historical, archival, back-up, and legacy computer files, whether in current or historic media or formats, such as digital evidence which may be used to support claims or defenses. Counsel shall also identify a person or persons with knowledge about the client’s information management systems, including computer-based and other digital systems, with the ability to facilitate, through counsel, reasonably anticipated discovery.

D.N.J. L. Civ. R. 26.1(d)(1). A Wyoming district court rule similarly directs that, prior to a Rule 26(f) conference, “counsel should carefully investigate their client’s information management system so that they are knowledgeable as to its operation, including how information is stored and how it can be retrieved.” Wyo. U.S.D.C.L.R. 26.1(d)(3).

67. *Hester v. Bayer Corp.*, 206 F.R.D. 683, 685-86 (M.D. Ala. 2001).

many technological changes had affected ordinary life between 1900 and 1950.<sup>68</sup> Yet the pace of change in the last two decades seems faster. Perhaps that is because the past always appears static, while the present is dynamic. Despite that possibility, rule makers cannot disregard the significance of changes they cannot forecast. When the Discovery Project got under way, I warned that rule makers should “beware of the assumption that today’s problems will also be tomorrow’s problems.”<sup>69</sup> That warning seems more pertinent now. At a minimum, it is a reason to avoid specifics and particulars (and thus to disappoint those who covet the certitude of specificity). It may even be a reason to defer action whenever the need for it, or the nature of the solution that could helpfully be devised, is uncertain.

#### H. *Rulemaking’s Long, Rocky Road*

Lawyers generally do not like rule changes. That may explain why they have complaints like this one:

The Federal Rules of Civil Procedure change with the telephone directory. Every year, something is tweaked, torn, wrenched, or rewritten. Most of this is merely annoying. Sometimes, though, buried amid the clutter is an amendment that carries a real wallop for major aspects of practice.<sup>70</sup>

Rest easy on this point—rule changes are not easy and they take a long time. By design, there is much opportunity to comment and to question before the amendments become effective. That deliberation should ensure that the ones that are adopted are sensible and fully understood.<sup>71</sup> But that delay means that immediate help cannot be expected from the rules process. Indeed, compared to the rate of

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68. See *supra* notes 3-5 and accompanying text.

69. Marcus, *supra* note 17, at 777.

70. Gregory P. Joseph, *Rule Traps*, Litig., Fall 2003, at 6, 6.

71. This process of comment is quite different from the manner in which Congress sometimes handles procedural issues. For example, a recent critique of the genesis of the supplemental jurisdiction statute, 28 U.S.C. § 1367, concludes that “[w]hat was easily predicted about § 1367 was that Congress’s hurried process and sloppy effort would create enormous confusion and expense.” Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 Emory L.J. 55, 85 (2004). Professor Freer makes a telling comparison to the rule-revision process:

[W]e should think about how Congress goes about its job of drafting jurisdictional statutes. It is striking that we cannot amend a Federal Rule of Civil Procedure without months of discussion, published drafts, and hearings. Yet we can change the jurisdiction of the federal courts without a remotely similar public process. Of course, the Federal Rules are not promulgated by a legislature with myriad responsibilities, so maybe we cannot expect such vetting, even of provisions that are far more important than the Federal Rules. Still, when acting in Title 28, the legislature should make an especial [sic] effort to have some meaningful process of review and comment.

*Id.* at 86.

change of technology in the area of e-discovery, rule changes move like molasses. To put that into concrete terms, if the Advisory Committee comes away from this conference convinced that certain rule changes are essential and should be pursued at the most rapid pace possible, and if all others involved in the rule amendment process agree, rule changes nonetheless could not become effective for nearly three years—on December 1, 2006. And that's only if all the lights are green.

#### CONCLUSION

If the past is prologue, we should expect that big changes, particularly in technology, will continue. At the same time, we should also expect that big changes in the Civil Rules will be rare. This was not always so,<sup>72</sup> but it has been a hallmark of recent decades. It is likely that some will be disappointed in any rule changes that emerge from the current consideration of e-discovery. Those with the most aggressive suggestions—and there have been some aggressive suggestions about e-discovery rule changes—are likely to think that more adventurous efforts should be made. Those who question the entire project—and this conference will show that there is a cogent view that no changes are needed—will likely feel that too much is being done. Those that are involved in trying to devise sensible rule amendment proposals, meanwhile, hope that most will be satisfied if not enthused.

#### EPILOGUE

After the Conference concluded, the Advisory Committee continued its examination of e-discovery issues in light of what it had learned at the Conference. After intense activity, it developed proposed amendments to several rules and, in June 2004, the Judicial Conference Committee on Rules of Practice and Procedure approved for publication a preliminary draft of proposed amendments. After publication of the preliminary draft in August 2004,<sup>73</sup> and a six-month public comment period<sup>74</sup> including public hearings,<sup>75</sup> the Advisory Committee will review the public commentary and decide whether to recommend adoption of rule amendments. The amendment package

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72. See Richard L. Marcus, *Reform Through Rulemaking?*, 80 Wash. U. L.Q. 901 (2002) (contrasting the aggressiveness of rulemaking in the 1930s with the more cautious attitudes of recent years).

73. See Comm. on Rules of Practice and Procedure, Judicial Conference of the United States, Report of the Civil Rules Advisory Committee (Aug. 3, 2004), available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>.

74. See Federal Rulemaking, at <http://www.uscourts.gov/rules/newrules1.html> (last modified Aug. 9, 2004) (stating that comments are due by Feb. 15, 2005).

75. See Federal Rulemaking, at <http://www.uscourts.gov/rules/newrules2.html> (last modified Aug. 9, 2004) (listing dates and locations of meeting and hearings).

includes the following features:

#### *Early Conference*

Rule 26(f) would be amended to direct the parties to discuss any issues regarding discovery of electronically-stored information and report on those issues to the court.<sup>76</sup> Rule 16(b) would be amended to recognize that the scheduling order could include provisions dealing with e-discovery.<sup>77</sup>

#### *Form of Production*

Rule 34(b) would be amended to permit a party serving a Rule 34 request to specify the form for production of electronically-stored information.<sup>78</sup> The responding party could object to the requested form.<sup>79</sup> If no form were specified in the request, the producing party could choose either to produce in a form in which it maintains the information, or in an electronically searchable form.<sup>80</sup>

#### *Interrogatories*

Rule 33(d) would be amended to recognize that a responding party that wants to take the option of providing access to business records may do so with regard to electronically-stored records.<sup>81</sup> Note is made of the possible need for special arrangements to ensure that the electronic records can be used by the party seeking discovery.<sup>82</sup>

#### *Inaccessible Information*

Rule 26(b)(2) would be amended to excuse a party from producing information that is “not reasonably accessible” in response to a discovery request if it identifies the information it has not produced.<sup>83</sup> If there is a discovery motion regarding production of this information, the producing party must demonstrate that the information is not reasonably accessible, and if it makes that showing, the court may still order discovery for good cause and may specify terms and conditions for such discovery.<sup>84</sup>

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76. See Comm. on Rules of Practice and Procedure, *supra* note 73, at 6.

77. *Id.* at 8.

78. *Id.* at 16.

79. *Id.*

80. *Id.*

81. *Id.* at 14.

82. *Id.* at 14-15.

83. *Id.* at 11.

84. *Id.* at 12.

*Privilege Waiver*

Rule 26(f) would be amended to recognize that the parties may agree to arrangements to facilitate discovery by guarding against waiver.<sup>85</sup> Rule 16(b) would be amended to recognize that the court may enter an order based on the parties' agreement to protect against waiver.<sup>86</sup> In addition, Rule 26(b)(5) is amended to provide a procedure for presenting the question whether there has been a waiver after privileged material is produced by a party that did not intend to waive the privilege.<sup>87</sup> These provisions would apply to all discovery, although they could be particularly important with regard to discovery of electronically-stored information.<sup>88</sup>

*Sanctions for Loss of Electronically-Stored Information*

Rule 26(f) would be amended to direct the parties to discuss preservation of discoverable information, including electronically-stored information, during their early conference.<sup>89</sup> Rule 37(f) would be amended to forbid sanctions against a party for loss of information due to the ordinary operation of its electronic information system if the party took reasonable steps to preserve the information after it knew or should have known that the information was discoverable in the action.<sup>90</sup> If the loss of the information violated a court order in the action, the protection against sanctions would not apply.<sup>91</sup> The Advisory Committee continues to examine the degree of culpability that should be required to overcome such a "safe harbor," and the preliminary draft invites comment on framing the provision in terms of reckless or intentional loss of electronically-stored information.<sup>92</sup>

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85. *Id.* at 9.

86. *Id.*

87. *Id.* at 12-14.

88. *Id.* at 9-10, 13.

89. *Id.* at 8.

90. *Id.* at 17.

91. *Id.*

92. *Id.* at 19.

## *Notes & Observations*