

MINUTES
CIVIL RULES ADVISORY COMMITTEE
APRIL 14-15, 2005

1 The Civil Rules Advisory Committee met on April 14 and 15, 2005, at the Administrative
2 Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Lee H.
3 Rosenthal, Chair; Judge Michael M. Baylson; Judge Jose A. Cabranes; Frank Cicero, Jr., Esq.;
4 Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.;
5 Dean John C. Jeffries, Jr.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell;
6 Judge Shira Ann Scheindlin; and Chilton Davis Varner, Esq.. Professor Edward H. Cooper was
7 present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge David
8 F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented
9 the Standing Committee. Chief Judge Anthony J. Scirica, former Chair of the Standing Committee,
10 also was present. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules
11 Committee. Professor Daniel J. Capra, Reporter for the Evidence Rules Committee, attended the
12 discussion of draft Civil Rule 5.2 by telephone as Lead Reporter for the E-Government Act
13 Subcommittee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeff Barr represented the
14 Administrative Office; Robert Deyling also attended. Thomas Willging represented the Federal
15 Judicial Center. Ted Hirt, Esq., Elizabeth Shapiro, Esq., and Stefan Cassella, Esq., Department of
16 Justice, were present. Brooke D. Coleman, Esq., attended as Rules Law Clerk for Judge Levi.
17 Observers included Jeffrey Greenbaum, Esq. (ABA Litigation Section Liaison); Alfred W. Cortese,
18 Jr., Esq.; and Anne E. Kershaw.

19 Judge Rosenthal opened the meeting by asking all participants and observers to identify
20 themselves. New members Baylson and Varner were introduced. Judge McKnight's passing was
21 noted with deep sadness. He contributed to the Committee's work in many valuable ways, including
22 his service as chair of the subcommittee that worked so vigorously to develop the Supplemental Rule
23 G proposal on the present agenda to recommend for adoption. He will be greatly missed. The
24 impending conclusions of the terms of service of members Jeffries and Scheindlin also were noted,
25 with the hope that they would attend the fall meeting immediately after completion of their formal
26 duties.

27 Judge Rosenthal further noted that the Supreme Court has approved and transmitted to
28 Congress proposed amendments to Rules 6, 27, and 45, as well as Supplemental Rules B and C. The
29 Judicial Conference approved the proposed new Rule 5.1 at its March meeting, and sent the rule to
30 the Supreme Court. Congress, meanwhile, has enacted the Class Action Fairness Act. The
31 Committee will work with the Federal Judicial Center to monitor the short- and long-term effects
32 this new law may have on the numbers and types of class-action cases brought to the federal courts.

33 The Style Project has been posted on the web and published. In these early days there have
34 been 70 "hits" on the Style page, and 90 on the style-substance page. Work is going on with the
35 Forms. The consultants have collaborated on a first draft that has been reviewed by the Reporter and
36 is now being studied by Professor Rowe as consultant. If possible, it will be useful to ready the
37 Forms for presentation to the Standing Committee on a schedule that would enable publication at
38 a time that would correspond with completion of work on the Rules. Advisory Committee members
39 should expect to become involved in this work soon. There is a lot of work to do, both in details and
40 in the big questions. It will be important to avoid entanglement in the charms of detail. If the central
41 issues can be addressed promptly, some of the details may properly be deferred for further work
42 during the comment period.

43 John Rabiej delivered a legislation report. The current focus is on bills that would directly
44 amend Rule 11 to undo the 1993 revision of the 1983 amendments. The safe harbor added in 1993
45 would be eliminated. Mandatory sanctions would be restored. Similar bills have been introduced
46 in every Congress since 1995. The House passed such a bill in 2004. Now the proposal is back.

47 The Federal Judicial Center has undertaken a new survey of judges. The survey responses show an
48 astonishingly high level of support for the 1993 rule, and resistance to amendments that would revert
49 to the 1983 rule. The report is being transmitted to Congress.

50 Judge Rosenthal noted that the agenda materials have grown out of months of hearings,
51 hundreds of written comments, and intense work by Committee members. She thanked everyone
52 who participated in this arduous process.

53 **October 2004 Minutes**

54 The draft minutes for the October 2004 meeting were approved, subject to correction of
55 minor errors.

56 **I PUBLISHED RULES REVIEWED FOR ADOPTION**

57 **(A) Rule 5(e)**

58 In November 2004 the Standing Committee published for comment rules that would
59 authorize adoption of local district rules that require electronic filing. The Civil Rule version
60 proposed a simple amendment of Rule 5(e):

61 * * * A court may by local rule permit or require papers to be filed, signed, or
62 verified by electronic means that are consistent with technical standards, if any, that
63 the Judicial Conference of the United States establishes.

64 The published Committee Note observed that the courts that already have adopted local rules
65 that mandate electronic filing "recognize the need to make exceptions for parties who cannot easily
66 file by electronic means, and often recognize the advantage of more general 'good cause'
67 exceptions." The Note went on to suggest that experience with these local rules would facilitate
68 gradual convergence on uniform exceptions.

69 There were not a great number of comments. The comments, however, suggested in many
70 ways that the national rule should not rely on mere comment in a Committee Note to ensure that
71 local rules will make sufficient accommodation for the needs of those who are unduly challenged
72 by electronic filing. The Bankruptcy Rules Committee voted to include a new sentence: "Courts
73 requiring electronic filing shall reasonably accommodate parties who cannot feasibly comply with
74 the mandatory electronic filing." The Appellate Rules Committee, scheduled to meet three days after
75 conclusion of the Civil Rules Committee meeting, also is considering alternative rule text provisions
76 that would require local rules to recognize the need for exceptions.

77 Discussion began by agreeing to follow the lead of the other advisory committees. It is
78 difficult to find any concern unique to civil practice that distinguishes the Civil Rules from the
79 Bankruptcy or Appellate Rules in this respect, nor for that matter any concern unique to criminal
80 procedure that might suggest that because the Criminal Rules incorporate the Civil Rules filing
81 provision the Civil Rules should depart from the other rules. Uniformity should be pursued under
82 the leadership of the Standing Committee.

83 Drafting the exception was discussed briefly. Several alternatives were set out in the agenda
84 book. One concern is that Rule 5(e) and the parallel rules authorize local rules, so that it may be
85 better to speak to what a local rule may do rather than to what a court may do. A second concern
86 was that "reasonably accommodate" has overtones of disability discrimination law and might
87 complicate, by inapt analogies, disputes over the drafting and application of local rules exceptions.
88 A third concern was that although the comments emphasized the challenges that face pro se litigants,

89 including those lodged in prison facilities without ready access to Internet communication, it would
90 be unwise to direct that pro se litigants must always be exempt from a mandatory e-filing
91 requirement. Some courts are willing and able to support electronic filing by use of courthouse
92 equipment, and both courts and the parties may benefit from it.

93 Responding to these concerns, one of the agenda book variations read: "may by local rule
94 permit or — if exceptions are allowed for good cause — require papers to be filed, signed, or
95 verified by electronic means." This formulation met the objection that "good cause" seems to call
96 for individualized determinations on a case-by-case basis. On this view, it would be unwise to
97 require that local rules provide for exceptions in terms that require a specific determination based
98 on the circumstances of each litigant who requests paper filing.

99 A tentative variation was proposed and approved for further consideration as the several
100 advisory committees work together to achieve a uniform provision mandating that local e-filing rules
101 allow some exceptions from mandatory electronic filing:

102 may by local rule permit or — if reasonable exceptions are allowed — require papers
103 to be filed, signed, or verified by electronic means * * * .

104 A second question was raised in reaction to the Appellate Rules Committee agenda. The
105 Appellate Rules Committee has been asked to recognize that a court that requires electronic filing
106 may also require that duplicate paper copies be filed. The request reflects the special concern that
107 appellate judges want paper briefs. There may be similar concerns with respect to some civil filings,
108 particularly briefs. It was noted that the cost of printing extensive papers is a serious drain on
109 district-court budgets. After brief discussion, it was concluded that the circumstances of civil-action
110 filings are so variable that the Civil Rules are properly distinguishable from whatever better-focused
111 needs may arise with appellate practice. Neither Rule 5(e) nor the Committee Note need say
112 anything about the prospect that a local rule may require duplicate electronic and paper filings. A
113 different approach in the Appellate Rules — if one is taken — does not require uniformity.

114 **B. Rule 50(b)**

115 The August 2004 proposals included revisions of Rule 50(a) to conform to current Style
116 conventions, and two substantive revisions of Rule 50(b). The first Rule 50(b) revision would
117 permit renewal after submission to the jury of any motion for judgment as a matter of law made
118 during trial. This would soften the current approach, which on the face of the rule permits a post-
119 submission motion only to renew a motion that was made at the close of all the evidence. Numerous
120 appellate decisions have begun to soften the present rule at the margins, and it has seemed time to
121 substitute a new and clear provision. The second revision would restore a feature present in Rule
122 50(b) until an unexplained disappearance in 1991, setting a time limit for renewing a pre-submission
123 motion after a jury has failed to agree.

124 Comments on the published rule generally were favorable, noting that despite nearly 70 years
125 of familiarity the close-of-all-the-evidence requirement remains a trap for the unwary and does not
126 serve any purposes that cannot be served by a motion made during trial. On the other hand, parts of
127 a few comments suggested that it is not too much to expect lawyers to be "wary of and follow the
128 rules."

129 The published rule text was approved with modest revisions. In Rule 50(a)(1)(A), a late
130 Style Project change was adopted: "(A) ~~determine~~ resolve the issue * * *." Also in keeping with a

131 Style Project volte face, "considered" was restored to its position in present Rule 50(b): "the court
132 is considered deemed to have submitted the action to the jury * * *." And at the suggestion of the
133 Style Consultant, a comma will be removed: "no later than 10 days after the entry of judgment; or
134 — if the motion addresses a jury issue * * *."

135 It was agreed that the Committee Note would be revised in one sentence to track the language
136 of the 1991 Committee Note:

137 Because the Rule 50(b) motion is only a renewal of the earlier pre-verdict motion, it
138 ~~can be supported only by arguments made in support of the earlier motion~~ it can be
139 granted only on grounds advanced in the pre-verdict motion.

140 C. Supplemental Rule G (with A, C, E, 9(h), 14, 26(a))

141 Supplemental Rule G was published in August 2004 to bring together in a single rule almost
142 all of the Supplemental Rule provisions dealing with civil forfeiture. Many new provisions are
143 added as well, to reflect developments in legislation, constitutional principles, and decisional law.
144 The proposal was hammered out in subcommittee and Committee discussions that spanned a long
145 period, and involved close cooperation with the Department of Justice and representatives of the
146 National Association of Criminal Defense Lawyers. Perhaps because of this lengthy development,
147 the published proposal drew few comments. But continuing review has pointed to several minor
148 revisions that are described in the agenda materials. Most of these revisions were approved without
149 further discussion, but several questions remained.

150 The first question went to the revised title for the Supplemental Rules. The agenda materials
151 picked up a suggestion that "Maritime" be deleted from the title on the theory that no one any longer
152 pays any attention to whatever technical distinctions may once have been drawn between "admiralty"
153 and "maritime" matters. Further consideration has suggested that this change not be made. Many
154 of the Civil Rules refer to the Supplemental Rules or otherwise refer to admiralty or maritime claims.
155 So too do statutes. 28 U.S.C. § 1333 establishes original jurisdiction of "[a]ny civil case of admiralty
156 or maritime jurisdiction," reflecting the Article III § 2 definition of the judicial power as extending
157 to "all Cases of admiralty and maritime jurisdiction." It was agreed that the title should become:

158 Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Cases.

159 The next subject of discussion was Rule G(6)(a), which as published provides: "The
160 government may serve special interrogatories *under Rule 33* * * *." The cross-reference to Rule 33
161 was included to reflect a deliberate decision that these special interrogatories should count against
162 the presumptive 25-interrogatory limit established by Rule 33. The government, however, believes
163 that some cases present such complex standing issues that the special interrogatories directed to
164 standing may push it too close to the limit. The paths of ownership and the claimant's relationship
165 to the property may be very complex.

166 Discussion began by noting that generally the Committee has resisted making special
167 exceptions from rules that provide presumptive limits. The Committee Note could refer to the need
168 to get permission to exceed the 25-interrogatory limit in light of the occasional need to devote
169 several interrogatories to preliminary claim-standing issues. But it was responded that the
170 government is the only party doing discovery on standing. A typical example of the complex cases
171 would be that Corporation A is owned by Corporation B; Corporation B's owners have transferred
172 ownership to others, some of whom are fugitives. Working through the relationships to the
173 defendant property that may support or defeat claim standing can require elaborate inquiry.

174 Sympathy was expressed for this view, with a suggestion that the rule text should be revised
175 to retain the incorporation of Rule 33, but to add an express exemption of these special
176 interrogatories from the numerical limit. An express rule provision seems better than retaining the
177 published text and attempting to effect a release from the numerical limit solely by observations in
178 the Committee Note.

179 An alternative was suggested: the rule text incorporation of Rule 33 could be deleted, while
180 the Committee Note could observe that the Rule 33 numerical limit does not apply to Rule G(6)
181 special interrogatories, while Rule 33 otherwise applies to special interrogatories as well as all
182 others.

183 Both suggestions were resisted on the ground that a court will readily grant relief from the
184 25-interrogatory limit in cases that require a large number of special interrogatories.

185 On motion, the Committee voted, with one dissent, to strike "under Rule 33" from the rule
186 text. The Committee Note will observe that the special interrogatories do not count against the
187 presumptive limit to 25-interrogatories, but that Rule 33 procedures otherwise do apply.

188 The next question addressed revisions proposed for Rule G(8)(c). The revisions serve two
189 purposes. One is to correct a misleading implication in published (8)(c)(iii) that a motion on the
190 pleadings involves disputes of material fact. The other and more general purpose is to make it clear
191 that the government can use each of three different procedures, successively or in combination, to
192 raise the questions covered by (8)(c): motions addressed to the pleadings, summary judgment, or a
193 hearing. The Committee approved this revision:

194 **(c) Motion to Strike a Claim or Answer.**

195 **(i)** At any time before trial, the government may move to strike a claim or
196 answer:

197 **(A)** for failing to comply with Rule G(5) or (6), or

198 **(B)** because the claimant lacks standing to contest the forfeiture.

199 **(ii)** The government's motion:

200 **(A)** must be decided before any motion by the claimant to dismiss the
201 action; and

202 **(iii)** If, because material facts are in dispute, a motion under (i)(B) cannot be
203 resolved on the pleadings, the court must conduct a hearing. The
204 claimant has

205 **(B)** may be presented as a motion for judgment on the pleadings or as
206 a motion to determine after a hearing or by summary
207 judgment whether the claimant can carry the burden of
208 establishing standing based on by a preponderance of the
209 evidence.

210 It was pointed out that under Style Project conventions, the three alternatives described in
211 item (B) are independent; the government can pursue any or all of them.

212 The next question went to the Committee Note discussion of subdivision (4). The third
213 paragraph of the published Note, appearing at page 24 of the agenda materials, addressed the choice

214 among alternative means of publishing notice of a forfeiture proceeding in these words: "A
215 reasonable choice of the means likely to reach potential claimants at a cost reasonable in the
216 circumstances suffices." The government has suggested that the Note should be revised to reflect the
217 rule text: "The government should choose from among these means a method that is reasonably ~~A~~
218 ~~reasonable choice of the means~~ likely to reach potential claimants at a cost reasonable in the
219 circumstances suffices." This change was recommended by the agenda memorandum, subject to
220 discussion whether both the published version and the revised version are unduly favorable to the
221 government's interest in saving publication costs.

222 Discussion began by noting that the subcommittee encountered difficulty with this question.
223 It was worried that the government might make arguments that weigh cost too heavily in the
224 competition between cost and effective notice. But it was responded that the rule requires that any
225 means chosen be reasonably likely to reach claimants. The reference to costs helps to reduce post-
226 forfeiture squabbles by late-appearing claimants that a different and more expensive means of notice
227 might have been more effective. It must be remembered that the published notice provisions of Rule
228 G(4)(a) are supplemented by the first-ever provisions in Rule G(4)(b) that require direct notice to
229 any person who reasonably appears to be a potential claimant on the facts known to the government.
230 The Committee approved the proposed revised language.

231 The next topic explored the published Committee Note discussion of subdivision
232 (4)(b)(iii)(B), which provides that notice to a potential claimant may be sent to "the attorney
233 representing the potential claimant with respect to the seizure of the property or in a related
234 investigation, administrative forfeiture proceeding, or criminal case." The published Note advised
235 that "[t]his provision should be used only when notice to counsel reasonably appears to be the most
236 reliable means of notice." The Department of Justice commented that this advice is contrary to the
237 rule text, and invites endless disputes. In response to this comment, the agenda materials proposed
238 a revised version: "Notice to counsel provides a desirable safety net when notice also is sent to the
239 potential claimant, adding protection against the risk that notice to the claimant may miscarry. But
240 this provision should be used to substitute for notice to a potential claimant only when notice to
241 counsel reasonably appears to be the most reliable means of notice." A footnote observed that the
242 Department of Justice would like one more sentence: "If notice is directed to the claimant but
243 miscarries, notice to counsel satisfies this rule."

244 Discussion began with the statement that the Department of Justice routinely sends notice
245 both to the potential claimant and to counsel. Typically counsel represents the claimant in a
246 prosecution related to the civil forfeiture. Notice to the claimant may fail — a common reason is
247 because, unknown to the Department, the claimant has been transferred from one jail to another.
248 Due process should be satisfied by notice to counsel. The Committee Note could provide
249 reassurance.

250 It was asked whether the better resolution of these questions might be to strike all of the
251 attempt to explain, reducing this Note paragraph to a simple statement that notice may be directed
252 to a potential claimant through counsel.

253 The first response was an observation that the attorney "may be long out of the case" when
254 the civil-forfeiture notice is sent. The attorney may have undertaken a limited representation. Why
255 should the attorney be subjected to additional obligations? Any provision for notice to the attorney
256 is a matter for concern.

257 A similar response observed that many lawyers believe they are no longer involved after a
258 conviction.

259 It was responded that Rule G(4)(b)(iii)(B) allows notice to the attorney "representing" the
260 potential claimant — it is satisfied only if there is a current representation. The civil forfeiture
261 complaint, moreover, typically comes before the criminal prosecution. This observation was picked
262 up with the suggestion that the rule text might be amended to refer to the attorney "then representing"
263 the potential claimant. But this suggestion was resisted on the ground that it would lead to
264 arguments based on the precise timing of the representation.

265 A Committee member noted that in his experience forfeiture is routinely sought in the
266 criminal prosecution. When it is not, the criminal defense lawyer often does not think that the
267 representation extends to civil forfeiture proceedings.

268 The rule was defended on the ground that the only obligation it imposes on the attorney is
269 to transmit the notice.

270 A motion was made to delete the last two sentences in the Committee Note paragraph
271 running from page 26 to page 27 of the agenda materials, so it would read:

272 Notice may be directed to a potential claimant through counsel, but only to
273 counsel already representing the claimant with respect to the seizure of the property,
274 or in a related investigation.

275 Discussion of the motion began with an expression of dissatisfaction with the rule itself. An
276 attorney who fails to forward the notice may later face a claim by the potential claimant for the
277 failure. This view was supported with the suggestion that Rule G(4)(b)(iii)(B) should be changed.

278 The rule text was defended on the ground that current law accepts notice to counsel as
279 satisfying due process. But it was recognized that the speaker was not sure whether notice to counsel
280 representing a potential claimant in a related investigation satisfies due process.

281 Those who questioned the rule itself recognized that notice to the attorney seems appropriate
282 if the attorney is representing the claimant with respect to the seizure of the defendant property. And
283 those who supported the rule agreed that it is important that the attorney's representation be in an
284 investigation, administrative forfeiture proceeding, or criminal case that is related to the seizure of
285 the property. An attorney providing representation in a matter of family law, estate planning, or
286 other separate matters should not be addressed with the notice. But it was asked whether
287 representation in an investigation or the like is "related" if the representation does not address the
288 seizure? There are clear cases — the attorney may represent the potential claimant in a prosecution
289 for the offense that gives rise to the forfeiture. But, it was protested, "related" is a potentially
290 expansive word and is "not all that clear."

291 The rule was further challenged directly. An attorney who represents the potential claimant
292 in the drug prosecution, which certainly looks like a related criminal case, does not want the
293 obligation to forward notice of the civil forfeiture proceeding.

294 The rule was defended on the ground that it deals with the client, seeking to defuse a post-
295 forfeiture challenge on the ground that there was no individual notice of the forfeiture proceeding.
296 But this defense was attacked as an effort to convert the government's problem into the attorney's
297 problem. And it was noted that the rule text may afford the government a choice among attorneys
298 when the potential claimant has different attorneys providing representation in a number of different
299 related proceedings.

300 A rule-friendly question asked how difficult is it for the attorney who gets notice to connect
301 the notice with the client? The government is able to identify the attorney only because there is in

302 fact a representation in a related proceeding of some sort. But the doubters renewed the question
303 whether "related" is too elastic.

304 A suggestion was ventured that the rule might require notice "to the potential claimant or and
305 to the attorney representing the potential claimant," etc. But this suggestion was promptly rejected.
306 At the least, notice to the potential claimant should suffice. The government may not yet know the
307 identity of the attorney, nor whether the potential claimant yet has an attorney.

308 Discussion turned back to the sentence that appeared in the published Committee Note: "This
309 provision should be used only when notice to counsel reasonably appears to be the most reliable
310 means of notice." It was suggested that this sentence was inconsistent with the rule text, which
311 simply provides an option to notify the potential claimant or the attorney. Rule G(4)(b)(iii)(A) does
312 require that the notice be sent by means reasonably calculated to reach the potential claimant, but
313 does not require the most reliable means.

314 The motion to delete all but the first sentence of the Committee Note paragraph describing
315 notice to counsel for the potential claimant passed, 7 Yes and 4 No.

316 A later question asked whether the Committee Note might still be expanded to state that if
317 notice is sent to a potential claimant but miscarries, notice received by an attorney representing the
318 potential claimant satisfies the rule. This question will be noted in the final version of Rule G that
319 will be circulated to the Committee before submission to the Standing Committee.

320 Going back to the rule text, a question was raised about Rule G(5)(a)(iii). The published text
321 says simply: "A claim filed by a person asserting an interest as a bailee must identify the bailor." The
322 government is concerned that the rule should impose a more specific requirement that a bailee
323 specify whether the claim is for the bailee's own interest, is on behalf of the bailor, or both. A
324 common illustration arises when cash is seized from a courier and claims are filed both by the
325 courier and by another person who asserts an interest as owner-bailor. It is possible that a bailee can
326 have a claim to protect its own possessory interest, while the bailor also has a claim. But the bailee
327 may be innocent, while the bailor is not. It was agreed that (5)(a)(iii) would be revised to read:

328 A claim filed by a person asserting an interest as a bailee must identify the bailor and,
329 if filed on the bailor's behalf, must state the authority to do so.

330 The Committee further approved a number of minor changes that were described and
331 explained in the agenda materials.

332 The Committee then voted to send the revised Rule G to the Standing Committee with a
333 recommendation that it be transmitted to the Judicial Conference for adoption. This action included
334 the published amendments to Supplemental Rules A, C, and E to conform to adoption of Rule G,
335 and also the published amendment of Civil Rule 26(a)(1)(E) that adds to the exemptions from initial
336 disclosure requirements "a forfeiture action in rem arising from a federal statute."

337 In addition, the approval of Rule G for adoption included two conforming amendments
338 recommended for adoption without publication. The first amends Rule 9(h) to reflect the changed
339 Supplemental Rules Title:

340 A pleading * * * may contain a statement identifying the claim as an admiralty or
341 maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental
342 Rules for Certain Admiralty and or Maritime and Asset Forfeiture Cases. * * *

343 The second amends Rules 14(a) and (c) to correct the cross-reference to Supplemental Rule C to
344 correspond with the new designation as Rule C(6)(b~~a~~)(1).

345 **D. Electronic Discovery: Rules 16, 26, 33, 34, 37, 45**

346 A package of proposals dealing with discovery of electronically stored information was
347 published in August 2004. Amendments were proposed for Rules 16, 26, 33, 34, 37, and 45. More
348 than 250 requests to testify and written comments were received, and testimony was taken from
349 many witnesses at more than three days of public hearings.

350 Judge Rosenthal introduced discussion of the proposals by noting that the agenda book puts
351 the materials on context. For each rule, the materials propose changes from the published proposals
352 and frame the issues raised by the proposals and changes. The suggested changes have emerged as
353 Committee members have responded individually and in groups to the public comments, and have
354 continued to be made after the agenda book was distributed. The public comments provided "the
355 best CLE we've ever had." The comments and testimony provided a great deal of helpful and
356 sophisticated advice.

357 In 1999, Judge Paul Niemeyer, then Committee Chair, said that the Committee must address
358 the need to devise methods that will achieve full disclosure without imposing undue discovery
359 burdens in an era of almost unlimited access to information. The 2000 discovery rule amendments
360 set the stage for the work that followed. Now we have specific proposals and detailed reactions to
361 them. The next task is to evaluate the proposals in light of the reactions and — if possible — to
362 forge a final package that can be recommended for adoption.

363 *Rule 33*

364 The published proposal would add words to Rule 33(d) to make it clear that a party may
365 respond to an interrogatory by making available electronically stored information that enables the
366 requesting party to search for the information itself. The Committee Note describes the steps that
367 may be necessary to satisfy the existing Rule 33(d) requirements that the burden of deriving the
368 answer must be substantially the same for the requesting party as for the responding party, and that
369 the responding party specify the sources of information in a way that enables the requesting party
370 to identify the sources "as readily as can the [responding] party."

371 It was agreed that no reason had emerged to make any change in the published rule text.
372 Changes in the Committee Note, identified at footnotes 4, 5, and 6 on pages 4-5 of the agenda book
373 materials, were approved.

374 *Rule 34(a)*

375 One part of the changes proposed for Rule 34(a) is independent of the electronically stored
376 information issues. These changes make it clear that a party may ask to test or sample documents
377 or electronically stored information, just as it may ask to test or sample tangible things. The only
378 question raised during the comment period was whether this change might allow a party to demand
379 direct access to another party's electronic information storage system. Changes in the Committee
380 Note are recommended to address this concern. The changes say that the right of testing and
381 sampling "is not meant to create a routine right of direct access to a party's electronic information
382 system," and that courts should guard against undue intrusion through inspecting or testing such
383 systems. The Committee approved Rule 34(a) and the changes in the Committee Note.

384 A second question raised by the Rule 34(a) proposals is whether electronically stored
385 information should be defined in parallel with the definition of "documents," or whether
386 electronically stored information should be included within the parenthetical that identifies many
387 categories of information as subsets of "documents." This question was presented by alternative
388 drafts. Alternative 1 carries forward the published proposal, defining electronically stored
389 information in parallel with documents. Alternative 2 presents a "definition" or exemplification of
390 "documents" that includes electronically stored information.

391 Discussion began with the observation that one purpose in adding electronically stored
392 information to Rule 34(a) is to support drafting of the other rules provisions that address discovery
393 of such information. No set of words perfectly describes the phenomenon, but "electronically stored
394 information" seemed to do the job better than anything else. It seems broad enough to describe both
395 present storage techniques and future developments. If indeed technology finds ways to store and
396 retrieve information by means better described as chemical or biologic, language carried forward
397 from present Rule 34(a) will cover the new technology, either as a subset of documents or as a subset
398 of electronically stored information. Treatment as a subset of electronically stored information will
399 likely work better if the issues of storage and retrieval resemble current computer technology more
400 closely than traditional paper storage.

401 Alternative 1 "gives a touchstone that can be used in other rules." It recognizes that now, or
402 in the near future, most discovery will seek electronically stored information. Many practicing
403 lawyers have raised an objection that the bar has conducted discovery since 1970 under a Rule 34(a)
404 that clearly defines computer-based information within the category of documents, and should not
405 now be forced to make separate demands for production of "documents" and for production of
406 "electronically stored information." This minor adjustment of discovery requests, however, does not
407 seem to impose a significant burden. And over the years it has become increasingly awkward to
408 describe the more complex and constantly evolving forms of computer-based information as
409 "documents." Dynamic data bases are frequently cited as examples. The American College of Trial
410 Lawyers suggested that Rule 34(a) might instead be revised to refer to "information," but that term
411 is so broad as to require complicated qualifications.

412 Alternative 2 presents a different choice that is essentially a matter of rules architecture. By
413 including electronically stored information as one species of document, it makes it clear that a
414 request for documents includes electronically stored information. But that clarity is suggested as
415 well by the Committee Note for Alternative 1. This alternative may present a risk that other rules
416 drafted for electronically stored information do not have their intended meaning. A request for a
417 digital photograph, for example, might be met by the argument that it is a document, not
418 electronically stored information.

419 A motion to adopt the first alternative was supported with the observation that there is a
420 tendency for the Civil Rules to become archaic because they are so seldom changed. "Document"
421 does not easily describe dynamic data bases or other forms of computer-based information.

422 It was responded that "document" has long been a term of art. In daily practice, it is
423 understood that it includes information from all sources. And it avoids strained arguments such as
424 a contention that once electronically stored information has been printed it ceases to be electronically
425 stored information but has become a document. There is no benefit from alternative 1. It is better
426 to continue to use a single word — document — to describe all of these things.

427 A similar argument for Alternative 2 urged that neither approach is perfect. The rule aims
428 at obtaining information or data. At trial, a foundation must be laid to introduce the information as

429 evidence. "Document" has become the descriptive word of art. The real object is "information or
430 data in whatever form it is kept." It is better to stick with "document." So, for example, recordings
431 have come to be called documents.

432 Alternative 1 was then championed on the ground that "electronically stored information"
433 is becoming an accepted term in practice. It better reflects the dynamic character of such information
434 as something that exists and mutates apart from a piece of paper. The practicing bar will focus on
435 electronically stored information; there is no risk that discovery will fail because only documents are
436 requested. Setting electronically stored information before "documents" and outside the
437 exemplification of "documents" helps in drafting the other rules that address discovery of
438 electronically stored information, particularly the "two-tier" provisions of Rule 26(b)(2).

439 Support for Alternative 1 was also expressed on the ground that "there is no real difference
440 in practice." Alternative 1 corresponds with the published proposal, and is easier to adopt.

441 The suggestion that both Alternative 1 and Alternative 2 might be abandoned in favor of a
442 simple reference to "information" was brought back. It was urged that the underlying idea is
443 production of "media that retain information." It is important that the information be stored, not
444 "transient" in the way of things held briefly during computer operations and then discarded.
445 "Information" is not a desirable substitute.

446 Alternative 1 won further support on the ground that it supports the proposals to amend Rule
447 26(b). At the same time, it was asked whether we could abandon all of the material in the list of
448 items that are documents: why not simply use the Committee Note to remind people that writings,
449 drawings, graphs, and the rest are documents? Part of the response was that careful lawyers will
450 continue to use all of these items in defining a request for documents, so it makes no real difference.

451 Ambivalence was expressed by another Committee member. The advantage of Alternative
452 1 is that it was published, and it does support the drafting of the other proposals. Apart from that
453 concern, Alternative 2 is better. But we might as well adhere to Alternative 1.

454 Stronger support for Alternative 1 was expressed by suggesting that "Alternative 2 is too
455 arcane. Alternative 1 is evolutionary — it's kind of where we are now." The visionary alternative
456 would be "recorded information," but there is no need to adopt a visionary rule.

457 A motion to adopt Alternative 1 passed, 10 yes and zero no.

458 A related drafting issue was raised. Drawing from present Rule 34(a), the published proposal
459 carries forward "other data or data compilations stored in any medium — from which information
460 can be obtained, translated, if necessary by the respondent through detection devices into reasonably
461 usable form * * *." It has been suggested that we should delete "through detection devices." This
462 suggestion led back to the question whether the "list," described as long and complicated, is useful.
463 But the list has been very useful historically; it may remain useful to illustrate the range of examples
464 covered by Rule 34. And taking it out of the rule may have a practical effect, even if it is transferred
465 to a Committee Note. The rule text will endure and command attention; the Committee Note will
466 not.

467 Retention of most of the examples was further supported on the ground that the definition
468 of electronically stored information should be broad and to some extent open-ended. As the proposal
469 stands, the very same set of examples are used to "define" or exemplify both "documents" and
470 "electronically stored information." But some things are inherently one or the other. A digital
471 photograph seems more electronically stored information than document; a traditional negative or

472 print seem more a document than electronically stored information. The Committee has repeatedly
473 heard that future computers may rely on chemical or biologic technologies; retaining "other data or
474 data compilations stored in any medium" is important.

475 It was agreed to delete "through detection devices." These words, adopted cautiously in
476 1970, are now antiquated. The work of this rule segment is done by "translated, if necessary, by the
477 respondent ~~through detection devices~~ into reasonably usable form." A motion was then made to drop
478 all of the "translated" segment. It was protested that this would lose the allocation of the translation
479 burden to the respondent. It may be that there is some redundancy between these words and the
480 proposal to provide in Rule 34(b) that electronically stored information may be provided, absent
481 contrary agreement or order, in a reasonably usable form. But it is useful to carry forward an
482 expression that has endured in the rules for nearly 35 years. The question was deferred for possible
483 further consideration during the discussion of Rule 34(b).

484 Finally, it was agreed that it is useful to add one word to the published proposal by referring
485 to data or data compilations stored in any medium.

486 At the conclusion of the Rule 34(b) discussion, it was suggested that more words be deleted
487 from Rule 34(a): "and other data or data compilations stored in any medium — from which
488 information can be obtained, ~~translated, if necessary, by the respondent into reasonably usable form,~~
489 * * *." The suggestion was resisted. Again, it was observed that the Rule 34(b) provision for
490 producing electronically stored information in reasonably usable form only states one of two
491 alternative "default" forms of production to be invoked if the requesting party does not specify a
492 form in the request and the responding party does not state a form in the response. The proposed
493 new Rule 34(b) provisions, further, apply only to electronically stored information. If new non-
494 electronic technologies emerge, this part of Rule 34(a) will continue to be the central provision for
495 production in reasonably usable form. Finally, this provision may have some bearing on the
496 problems that may arise if a responding party seeks to produce information in a form in which it is
497 ordinarily maintained but that is not reasonably usable by the requesting party.

498 *Rule 34(b).*

499 Discussion of the proposed Rule 34(b) amendments began with some new drafting details.
500 Rather than refer simply to the "form" of production, the revised draft refers to the "form or forms"
501 of production. This change reflects the proposition that different forms of electronically stored
502 information may best be produced in different forms. An image, for example, is likely to be
503 produced in a form quite different from the form used for e-mail messages. Wordprocessing
504 documents maintained in different programs may be best produced in different forms, and so on.
505 It is recognized that a simple reference to the "form" of production is consistent with requesting or
506 providing in different forms for different sets of information, but it seems useful to emphasize the
507 point by this more expansive drafting. This proposition is further underscored by breaking out from
508 part (ii) the provision now made a separate (iii), stating that a party need not produce the same
509 electronically stored information in more than one form.

510 Other changes in the Rule 34(b) text were noted. The sentence appearing at lines 42 to 46
511 on page 20 of the agenda materials is presented as a conditional alternative to the proposal to add
512 a new Rule 26(b)(2)(B) to address the problem of information that may be stored in sources that are
513 difficult to access. If the 26(b)(2)(B) proposal is adopted, this sentence will be dropped from Rule
514 34(b).

515 New material is added to the sentence that appears at lines 46 to 49. The purpose is to
516 require the responding party to state the form or forms it intends to use for production when the

517 requesting party has not specified a form in the request. This requirement will ensure that the
518 requesting party understands what is intended and has an opportunity to request a different form
519 before production is made. An alternative might be found in the comments suggesting that the rule
520 require the requesting party to specify a form, but the requesting party may not know enough about
521 the responding party's system to be able to make an intelligent request. It was asked why the rules
522 at times refer to a responding party and at other times refer to a producing party. In this setting,
523 "responding" seems appropriate because there has not yet been any production. Rule 34(b) itself
524 describes the first step after a request to produce as a "written response."

525 Support was expressed for requiring that the response state the intended form of production,
526 whether as an objection to a form specified in the request or as a statement when the request does
527 not specify a form. To be sure, a lawyer not yet sophisticated in electronic discovery may not
528 recognize the possibility that alternative forms of production may be possible. But the form of
529 production is an important issue. The requesting party needs a form that has good search
530 characteristics. The requesting party, moreover, may not know enough about the forms of storage
531 used by the responding party to be able to specify a form. Often a party conference or discovery is
532 needed to provide that information. This issue should be flushed out in the response to the request;
533 there is no other logical time to set for the designation.

534 Additional support was expressed, with the caution that the rule should make it clear that the
535 responding party "does not have the final word." The responding party states the form it "intends"
536 to use. If that does not suit the requesting party's needs, the parties must negotiate; if negotiation
537 fails, the court must resolve the matter.

538 It was asked whether a responding party might simply turn over the information without first
539 making a response, and choose the form of production by the act of producing.

540 A different observation was that even the responding lawyer may not know at the time of the
541 response — 30 days after the request is served — what forms the client has, or what forms make the
542 best sense for production.

543 Discussion took a different tack with the suggestion that there is an ambiguity in "form or
544 forms." The responding party, for example, may have information in a form searchable by a program
545 that the requesting party is not licensed to use. The responding party may prefer to respond by
546 transferring the information to a form searchable by a different program that the requesting party is
547 licensed to use. The rule does not preclude response in that form. Indeed, it clearly allows the
548 responding party to designate the program form it will use for production.

549 An adverse reaction suggested that the responding party should not be required to state a form
550 of production if the requesting party does not specify a form. The responding party should be
551 allowed to produce in its choice of form, leaving it to the requesting party to work things out later
552 if need be.

553 This reaction led in turn to an observation that this provision is tied to the "default" provision
554 in part (ii) that applies when the request does not specify a form of production. The responding party
555 may produce in a form or forms that are reasonably usable by the requesting party. (This default
556 provision was expanded in the later discussion.) This default provision will work better if the
557 responding party must state the form of production before producing, so that the requesting party can
558 determine whether the form is usable.

559 Drafting alternatives were discussed. It was suggested that the duty to state the form of
560 production should be separated. The first provision should apply only when the requesting party

561 specifies a form of production and the responding party objects to the form. The second provision
562 should be integrated with the part dealing with the default form of production when the request does
563 not specify a form. It was objected that this separation may lead to unnecessary courtroom steps; it
564 is better to get the statement in the response even if the request does not specify a form of
565 production. The statement fits nicely with the response to the request. There is no procedural strait
566 jacket here; if the responding party needs more than 30 days to state the form of production, it can
567 get more time to respond. The party who simply produces without first responding acts at its own
568 risk that the form it chooses, ignorant of the plaintiff's interests or needs, will not be reasonably
569 usable.

570 The drafting debate continued after the observation that the only dispute seemed to involve
571 drafting — everyone was agreed that the responding party should state the intended form of
572 production before producing.

573 The argument to provide two statements of the responding party's duty to specify the form
574 of production was renewed. A first provision when the request specifies a form; a second provision
575 coupled to the default form rules in (ii), requiring a statement to be made before actually producing.
576 And again it was asked just when the responding party is to provide its statement? The proponent
577 suggested these words: "before producing the information the responding party must specify the form
578 it intends to use."

579 This argument was again met by the counterargument that the question of form should be
580 raised at the very outset of the discovery process. It is important to confront the question before a
581 producing party can argue that it has invested in preparing to produce in one form and should not
582 have to shoulder the burden of switching to production in a different form. In every case involving
583 complex discovery, there will be initial deposition discovery directed at the form of production. It
584 would be better to state the duty twice, if need be, rather than separate it so that the responding
585 party's duty to state the form of production appears only in the default-form provisions.

586 A different compromise was suggested — the responding party's duty could be set out in (ii)
587 when the request does not specify a form, but the rule would direct that the statement must be
588 included in the written response to the discovery request.

589 It was agreed by several Committee members that the goal is to require that the responding
590 party state the intended form of production in the response to the discovery request. (ii), on the other
591 hand, addresses actual production. Stating the initial form fits well in the initial response, coupled
592 to the duty to state the intended form of production when the responding party objects to a form
593 specified in the request. If the responding party is not yet able to specify a form, the response likely
594 will say something general — production will be made "in a form or forms to be determined in
595 consultation with our technical experts." That response will do the job of focusing attention.

596 It was protested that providing that the responding party "must" state the form of production
597 "seems strong." The Committee Note should reflect that the responding party may need more than
598 30 days to determine the form of production, and that it should not always be bound to adhere to the
599 form initially stated. A response was that usually the request and response will occur after the Rule
600 26(f) conference; by that point the producing party ordinarily should be able to state a form or forms
601 of production.

602 It was agreed that the duty to state the intended form of production should remain as
603 proposed in lines 46 to 49. The Reporters will consider possible Note changes to reflect the concerns
604 expressed in the discussion: a responding party who fails to specify a form in its response should not
605 be forced to produce in whatever form the requesting party later demands. The 30 days allowed for

606 a response may not suffice to make an intelligent choice. And a party who produces without first
607 making a response may be vulnerable to a demand that it produce in another form better suited to
608 the requesting party's needs.

609 The default form of production then came on for direct discussion. The published proposal
610 provided a default form of production to be used when the request does not specify a form and a
611 form is not specified by party agreement or court order. The form could be either "a form in which
612 it [the information] is ordinarily maintained, or in an electronically searchable form." Public
613 comments suggested difficulties with each of these alternatives. The "ordinarily maintained" form
614 seemed to suggest that production must include metadata and embedded data, information not
615 apparent "on the screen" and often completely unknown to the person who generated the electronic
616 file. Reviewing such information for relevance, responsiveness, and privilege and other grounds for
617 protection can add significantly to discovery costs. There is no close analogue to such problems with
618 paper discovery, and the burdens may not be appropriate. Some comments, moreover, suggested that
619 production in "native format" generates problems of integrity—the information may be transformed
620 after production, often unintentionally, both in the hands of the requesting party and in the hands of
621 the producing party.

622 The alternative option to produce in an electronically searchable form also drew adverse
623 comment. There are many degrees of searchability; a party might produce in a form that is
624 marginally searchable rather than much more readily searchable forms that could be produced even
625 more easily. Some forms of electronically stored information, moreover, may not be electronically
626 searchable; "images" have been among the more frequently offered illustrations. This alternative
627 was proposed in the expectation that it would benefit from vigorous comment. The comments
628 suggest that it is not a workable provision.

629 The revised proposal presented in the agenda materials is that the default form of production
630 must be "reasonably usable by the requesting party."

631 Two difficulties were immediately suggested. The requesting party may have idiosyncratic
632 information systems that prevent reasonable use of most of the electronically stored information held
633 by other parties. It should not be able to impose the costs of its peculiar system on others. And the
634 responding party may have information in a form that is not reasonably usable by anyone, including
635 the responding party. "Legacy" data stored in antiquated formats and perhaps readable only on
636 museum hardware is an example.

637 The next observation was that the "default" provision is much more than a simple default.
638 It will become the baseline for negotiating the form of production. The producing party may want
639 to reduce functionality, searchability. "Reasonably usable" will encourage production in .pdf or
640 similar unsearchable forms, or even in paper. The proposed Committee Note language suggests that
641 usually electronically searchable form is required, but that may not fully reflect what is at stake.

642 "Reasonably usable" was defended as an attempt to reach the same goal as the published
643 "electronically searchable," but in a way less vulnerable to objections. But account must be taken
644 of the fear that the producing party will deliberately choose a form that degrades the searchable
645 qualities of the information. That is part of what makes it important that the parties discuss the form
646 of production at the Rule 26(f) conference, and that if the conference does not resolve the matter the
647 responding party specify the intended form of production before it actually produces the information.
648 The Committee Note revisions are designed to speak to these questions. The Note recognizes that
649 the responding party may have information in a form that the responding party cannot search
650 electronically, and accounts for that.

651 It was asked again whether the rule should say something about the need to limit production
652 in a form that reduces functionality. A spreadsheet, for example, may be producible at low cost in
653 a form that carries forward the full search capacities enjoyed by the responding party, or in a form
654 — perhaps at higher cost to the responding party — that is much less easily searched. At the same
655 time, it must be recognized that the processes that achieve an important "functionality" may
656 themselves deserve protection as proprietary information; some reductions in searchability may be
657 proper or even necessary. This topic is too important to be left to the Committee Note alone; it
658 should be addressed in rule text. This is a "big deal in current practice."

659 One possibility might be to attempt to express the element of searchability in defining the
660 form or forms of production. The first response was that although "electronically searchable" was
661 one of the alternatives in the published proposal, there was no clearly focused approach to the
662 question of maintaining or degrading the search functions. It was not meant to be "particularly
663 aggressive." But it was protested that "electronically searchable" was not meant to allow the
664 responding party to eliminate functional search characteristics that it is able to employ.

665 A different understanding of "electronically searchable" was expressed. This view was that
666 it was a "scaling down" from production of information in the form in which it is ordinarily
667 maintained. It contemplates a form that fits the requesting party's need for the information.

668 The proponent of addressing reduced search functions in the rule agreed that there must be
669 an accommodation for good reasons to reduce functions.

670 Another view was that the default form of production should not be "a lot less useful" to the
671 requesting party than it is to the responding party. But the rule should not require production in a
672 form that enables the requesting party to do things that the responding party could not do with the
673 form in which the information is ordinarily maintained. The producing party itself may not be
674 reasonably able to access or use information that it "has" only in an extended sense. This issue is
675 one that ties to the questions addressed by proposed Rule 26(b)(2)(B), which addresses discovery
676 of information stored in sources that are not reasonably accessible. Rule 34(b) does not override the
677 separate protection provided by 26(b)(2)(B). The Committee Note might say as much. But all of
678 Rule 26 qualifies all of the remaining discovery provisions in Rules 30, 31, 33, 34, 35, and 36;
679 perhaps there is no need for a redundant reminder. For that matter, the published rule did not require
680 production in a reasonably usable form, nor in an electronically searchable form — the responding
681 party could produce in the form in which the information is usually maintained.

682 The possibility of improved rule language was opened, but subordinated to possible guidance
683 in an expanded Committee Note. "Reasonably usable" is flexible, and draws directly from the
684 language of Rule 34(a) that calls for a responding party to translate data into reasonably usable form.
685 The Committee Note can give guidance on application in specific contexts. It might, for example,
686 say that a party who has information in a form that can be searched efficiently ordinarily should
687 produce in that form or in an equally searchable form, unless limited by proprietary interests in the
688 technology.

689 More directive Committee Note language was offered as an alternative. At a minimum, the
690 Note might say that "in most circumstances" production must be in a form as easily searched as the
691 form maintained by the responding party. It would be better to say that the responding party should
692 not be allowed to degrade functionality absent extraordinary circumstances or a showing of
693 prejudice. But the published proposal, requiring production either in the form ordinarily maintained
694 or in an electronically searchable form, would better support the appropriate directions in the
695 Committee Note.

696 Responding to a question whether a direction to produce in equally searchable form would
697 raise proportionality concerns, the proponent suggested that usually production in such form will cost
698 less. "Producing parties invest heavily to reduce functionality." Then the requesting party has to
699 invest more to restore the functionality. "Searchability" can be maintained without providing the
700 "full functionality" of the producing party's system.

701 With a passing note that the proposal says that the responding party "must," not "may" or
702 "should," produce in a specified default form, it was suggested that going beyond "search" "is wholly
703 uncharted waters."

704 A motion was made to adopt the proposed revised language to replace the published
705 proposal:

706 (ii) if a request for electronically stored information does not specify the form or
707 forms for producing electronically stored information, or production, a responding
708 party must produce the information in a form or forms that are reasonably usable by
709 the requesting party in which it is ordinarily maintained, or in an electronically
710 searchable form.

711 The motion failed, 6 Yes and 7 No. The result was to strike the "reasonably usable"
712 substitute and restore the alternative default forms in which ordinarily maintained or electronically
713 searchable.

714 One of the members who voted "no" then suggested that the matter should be reconsidered.
715 There continue to be good reasons to doubt the published version, particularly as to the alternative
716 to produce "in an electronically searchable form." A one-vote margin of decision, moreover,
717 suggests the need for further work.

718 It was suggested that it may be possible to combine elements of the published proposal and
719 the newer substitute. "Reasonably usable" is better than "electronically searchable." A form may
720 be electronically searchable but much less useful than the ordinarily maintained form. Beyond that,
721 in many cases .pdf or similar formats are perfectly usable. And even today, it is common to find that
722 all parties agree on production in paper form as sufficient to their needs.

723 The Committee was reminded that the comments expressed concern that a default calling for
724 production in a form ordinarily maintained by the responding party might call for "native format"
725 production, including metadata and embedded data. But it was noted that at least in many
726 circumstances the alternative default form would remain available — the responding party could
727 strip out the metadata and embedded data and still produce the information in a form that is
728 electronically searchable or that is reasonably usable by the requesting party.

729 A different problem with "native format" production was again recalled. Several of the
730 comments suggested that it is difficult to maintain the integrity of native format files. A "reasonably
731 usable" form is a requirement the parties can live with and work out. The requesting party, after all,
732 can specify a form it wants.

733 The analogy to paper records was invoked. With paper records, it is important to honor the
734 Rule 34(b) command to produce them "as they are kept in the usual course of business," or else
735 organized and labeled to correspond with the categories in the request. The present task is to adapt
736 this concept to production of electronically stored information. We do not want the responding party
737 to make it unnecessarily difficult for the requesting party to use the information.

738 A Committee member asked whether the rule need specify any default form at all. Why not
739 just rely on the parties to work it out? An earlier observation was repeated — the "default" form
740 specified in the rules will become the baseline for the parties' discussions and negotiations. "The
741 battleground is not the bumpkin litigant." The problem lies in attempts to produce in a format that
742 is not searchable. But the rejoining question asked why it is not enough that the rule will require the
743 responding party to state the form of production before it produces — the requesting party then has
744 an opportunity to negotiate for a different form, and to invoke the court's supervision if negotiations
745 fail.

746 It was suggested that Rule 34(a) already provides a default of sorts in requiring that a party
747 who produces "data or data compilations" must translate the data into reasonably usable form.
748 Perhaps that provision is enough of itself? The published "electronically searchable" does not
749 protect against production in degraded — less searchable — form. The central question may be the
750 level of guidance to be provided in the Committee Note.

751 Greater guidance in the rule was urged. "Reasonably usable," particularly as it appears in
752 Rule 34(a) — where it has appeared since 1970 — will always support arguments for production in
753 .pdf, similar nonsearchable forms, or paper. If the Committee does not want that argument to be
754 made in every case, Rule 34(b) should provide better guidance. And the Committee Note can say
755 that if special circumstances require, the court can order production in a form that is not
756 electronically searchable and that differs from the form ordinarily maintained.

757 A parallel observation was that the current draft Committee Note covers these points nicely.
758 The default rule will have effect not in the big cases, but in the "less heavily staffed" cases.

759 "Reasonably usable" was supported by the argument that courts continually rely on tests
760 expressed in terms of reasonableness. The words invite focus on the particular context. And that
761 is what this rule should do. It is the antithesis of a Manual on Electronic Discovery, something no
762 one wants the rule to become.

763 A motion was made to combine elements of the published proposal with elements of the
764 agenda book proposal:

765 (ii) if a request does not specify the form or forms for producing electronically stored
766 information, a responding party must produce the information in a form or forms in
767 which it is ordinarily maintained or that are reasonably usable by the requesting
768 party;

769 It was suggested that the Committee Note should be revised to provide stern warnings against
770 relying on the "reasonably usable" alternative to produce in a form that degrades the functionality
771 available to the responding party.

772 A related question asked whether, if the motion should pass, the Committee Note would take
773 a clear position on the question whether production in the form ordinarily maintained includes
774 embedded data and metadata? It is important to be clear, lest the question be litigated continually
775 and with conflicting results. Discussion of this question observed that however it may be for
776 wordprocessing programs, there are real problems with requiring production of embedded data and
777 metadata for other programs. It was noted again that "native format" information may not be stable,
778 and that a clear Committee Note statement that production in the form ordinarily maintained always
779 prohibits deletion of embedded data and metadata will lead to deletion and production as a form
780 "reasonably usable."

781 It was said again that the Committee must focus on preserving the search characteristics and
782 "functionality" available to the responding party. Issues as to embedded data and metadata arise only
783 if the responding party opts to produce in the form ordinarily maintained. They disappear if the
784 responding party falls back on a "reasonably usable" form. The Committee Note should focus on
785 search functionality.

786 Further agreement was expressed with the suggestion that the Committee Note should make
787 clear the impact of the alternative default forms on producing embedded data and metadata. But a
788 caution was raised: unless the Committee is quite confident of what it should say, "the less you say
789 the better."

790 Harking back to the rule text, it was observed that many of the comments by technically adept
791 lawyers and experts assume that production in the form ordinarily maintained includes embedded
792 data and metadata; that the form ordinarily maintained is "native format." "Reasonably usable," on
793 the other hand, does not have these connotations. It was protested that "reasonably usable" should
794 not be embellished in the Committee Note with references to embedded data or metadata.

795 Support for retaining the "form ordinarily maintained" alternative was expressed by
796 observing that some parties may prefer this as the simplest, lowest-cost alternative. If the form
797 ordinarily maintained is not reasonably usable by the requesting party, the responding party should
798 not be forced to bear the cost of converting the information to a form that is reasonably usable by the
799 requesting party. The court, after all, retains power to specify a different form of production.

800 Other Committee members argued that it is not possible to draft a Committee Note that will
801 provide "enough informed detail" about what "form ordinarily maintained" means. But the Note can
802 say that "reasonably usable" means searchable.

803 The embedded data and metadata question was put again: should the Committee Note say
804 that if the form ordinarily maintained includes such data, they must be produced under this
805 alternative? Or should it say something else on the subject? The Committee Note now says very
806 little. One occasional hint has been that metadata automatically generated by the computer are likely
807 to have greater functional value in discovery, while embedded data may be more likely to raise
808 privilege problems; it is unclear whether there is anything to this suggestion, nor what might be said
809 in response.

810 The motion was restated: the rule text should adopt as default alternatives production in a
811 form or forms in which the information is ordinarily maintained or that is reasonably usable by the
812 requesting party, coupled with "non-Manual but increased detail in the Committee Note." The
813 motion passed, 11 yes, 2 no.

814 It was suggested that consideration should be given to adding one word: "in a form or forms
815 in which it is ordinarily maintained or [an] other reasonably usable form."

816 Brief discussion of possible Committee Note revisions began by suggesting that the
817 "reasonably usable" form is important outside the default setting. If the requesting party specifies
818 a form, the responding party's opportunity to object does not mean that the responding party can
819 insist on production in a form that is not reasonably usable. But it was responded that this
820 proposition is so obvious that it need not be stated in the Note. A further response was that the
821 published Note included a statement that when an objection is made to a requested form of
822 production the court is not limited to the form specified by the requesting party or the specified
823 default forms. This language might be restored, perhaps with an additional statement the court also
824 is not limited to the form stated by the responding party.

825 It was agreed that the Committee Note should be further revised, particularly to address the
826 need for clarity on points that will recur frequently in practice.

827 *Rule 26(a)*

828 The August 2004 published proposals did not include any possible revision of Rule 26(a).
829 But it may be desirable to amend Rule 26(a)(1), and perhaps also 26(a)(3), to conform to the changes
830 recommended by the published proposals. No change in meaning is intended; to the contrary, the
831 purpose is to avoid possible unintended confusions.

832 Present Rule 26(a)(1)(B) calls for initial disclosure of "documents, data compilations, and
833 tangible things." Because the Committee has chosen to carry forward the published version of the
834 Rule 34(a) amendments, "data compilations" is unnecessary and perhaps confusing. As Rule 34(a)
835 would be adopted, "data compilations" often are both documents and electronically stored
836 information. It is better to revise (a)(1)(B) to read:

837 documents, electronically stored information, ~~data compilations~~, and tangible things
838 * * *

839 This change was approved as a conforming amendment, to be recommended to the Standing
840 Committee for adoption without publication for comment.

841 The pretrial disclosure provisions of Rule 26(a)(3)(C) present a similar question, but in a
842 context that may make a conforming amendment unnecessary. The revision would read:

843 (C) an appropriate identification of each document, all electronically stored
844 information, or other exhibits, including summaries of other evidence * * *

845 The inclusion of "all" was questioned, but defended on the ground that electronically stored
846 information "does not come in pieces." But "all" might suggest disclosure even if the electronically
847 stored information is not to be offered as an exhibit. The purpose of pretrial disclosure is to identify
848 things that will be offered in evidence at trial. If electronically stored information is to be offered,
849 it will be as an "exhibit"; the present rule requires disclosure without need for change. There should
850 be no confusion. A motion to retain present 26(a)(3)(C) without change passed, 12 yes, zero no.
851 But it was suggested that the Style Project may consider further the question whether "exhibit" is
852 sufficiently broad to include "document." The best revision may be "identification of each exhibit,
853 including * * *."

854 *Rule 26(f)*

855 The published proposals made three changes in Rule 26(f).

856 The first change appears in the initial unnumbered paragraph, adding to the directions for the
857 Rule 26(f) conference that the parties are "to discuss any issues relating to preserving discoverable
858 information." This provision applies to all forms of information, not only electronically stored
859 information. The comments expressed concern that although this is indeed a desirable subject for
860 discussion, explicit focus in the rule may invite profligate resort to preservation orders. Committee
861 Note language was prepared to respond to this concern, suggesting a strictly parsimonious approach
862 to preservation orders. The draft in the agenda materials included a statement that a preservation
863 order should be entered over objections only if "there is a substantial risk that discoverable

864 information will become unavailable unless an order is entered." Concerns have been expressed
865 about this advice as venturing too close to a statement of standards for preservation orders. It can
866 be cut back to the opening observation that a protective order entered over objections "should be
867 narrowly tailored." This reduction was supported on the ground that there is a body of decisional
868 law on the appropriateness of preservation orders. The Committee is not proposing a rule that sets
869 preservation-order standards. It is better not to intrude on the subject in the Committee Note.

870 A similar comment suggested that it is too broad to say that courts should not routinely issue
871 protective orders. Proposed Rule 37(f) will make preservation orders important.

872 A motion was made to abbreviate this Committee Note paragraph to say: "A preservation
873 order entered over objections should be narrowly tailored. Ex parte preservation orders should issue
874 only in extraordinary circumstances."

875 It was said that "issuing an order is the easy way out. Courts are tempted to do it, hoping to
876 reduce disputes." It was agreed that it is better that the parties work out these matters. The Note
877 language is designed to reduce the reflexive tendency to go to court, and responds to real concerns
878 expressed by the comments.

879 It was asked what are the arguments against routine preservation orders? The problem seems
880 to be that judges often are poorly informed about the consequences. As to electronically stored
881 information, many comments observed that overbroad orders can lead to paralysis of the information
882 system, or to great preservation costs.

883 This comment led to the observation that the real concern is with overbroad orders. This is
884 indeed a big issue. The parties sensibly negotiate narrower orders.

885 An added problem with overbroad orders is that they lead to "gotcha" litigation. Support was
886 voiced for retaining the first sentence of the agenda-book paragraph: "Courts should not routinely
887 issue preservation orders." Agreement for this view was added. The preservation order question ties
888 to the "two-tier" discovery proposal of Rule 26(b)(2)(B) and the "safe harbor" proposal of Rule 37(f).

889 An alternative approach was suggested. The Committee Note responds to the concern that
890 identifying preservation as a topic for discussion will lead to entry of overbroad protective orders.
891 The Note need only say that making preservation a topic for discussion does not imply that a
892 preservation order is appropriate. Something on the order of: "The rule encourages discussion, but
893 does not imply that discussion should lead to a preservation order." There is no need to state the
894 obvious — if an order is "overbroad," it is unwise.

895 The motion to strike the "Courts should not routinely" sentence was renewed. This led to a
896 revised motion: This Committee Note paragraph should begin with the statement that encouraging
897 discussion of preservation does not imply that a preservation order should be entered. Then state that
898 an order entered over objections should be narrowly tailored, and conclude with the statement that
899 an order should be entered ex parte only in extraordinary circumstances.

900 A counter-motion to restore the statement that a preservation order should enter only on
901 showing a substantial risk that discoverable information will become unavailable failed. Deleting
902 these words will not change the law. And this statement goes beyond the published Committee Note
903 into sensitive territory; it also goes beyond the published and proposed rule text.

904 The motion to restate this Committee Note paragraph was adopted, 12 Yes, zero No.

Rule 26(f)(4)

905

The published proposal added a new paragraph 26(f)(4), describing as an added subject for a proposed discovery plan:

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whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information;

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The agenda book recommends deleting the final three words, "of privileged information," because what is protected is the right to assert privilege — the right to assert should not be limited to correct assertions.

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The published proposals included a parallel provision in Rule 16(b)(6), adding to the elements that may be included in a scheduling order:

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

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This proposal fits with proposed Rule 26(b)(5)(B). Many comments, beginning before the e-discovery project was launched, emphasize the costs of guarding against inadvertent privilege waiver in the course of providing discovery of electronically stored information. But comments on the published proposal express concern that it may seem to promise more than it can deliver. The great concern is subject-matter waiver. Although the parties' agreement should protect against subject-matter waiver in the current litigation, a protection that is reinforced by adoption of the agreement in a court order, there is no guarantee that nonparties will be bound by the agreement or order in other litigation. This uncertainty is compounded by the fact that many privilege issues are governed by state law. The language of the published Committee Note has been revised to soften the possible appearance of uncertain assurance. It may be asked whether revisions should be made in the rule text to respond to the same concern. The references to a court order and to protecting might be dropped. Alternatives, dropping one or the other, are set out in the agenda book at footnote 8, page 18.

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As published, Rule 26(f)(4) is intended to encourage parties to discuss agreement, without encouraging courts to exert pressure to reach an agreement so as to speed up discovery. There has been a gradual retreat from the more aggressive Committee Note suggestions that entry of an order affirming an agreement may enhance the agreement's protective effect by encouraging other courts to take the agreement and order into account in applying their own rules on waiver. It may be asked whether, as so reduced, the proposal accomplishes anything useful? It still may be that court approval of an agreement will influence other courts to protect against waiver, even in litigation involving persons who were not parties to the agreement or order.

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Discussion began with an expression of support for the second alternative described in footnote 8: "(4) whether the court should enter an order confirming any agreement the parties reach regarding the right to assert a privilege after production of information to a party." This alternative contemplates a court order, but drops any reference to protecting a privilege. "Protecting" "gives a false appearance"; "confirming that parties' agreement" avoids the false promise, but does not encourage court action absent the parties' agreement.

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A third alternative was proposed: "(4) any issues relating to assertion of privilege." There would be no more — no reference to party agreement, to court order, or to protecting the right to assert privilege. Indeed, this approach might be opened up by shortening it still further: "(4) any issues relating to privilege."

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947 Picking up on these suggestions, it was argued that the proposal's reference to "the right to
948 assert privilege" is too broad. In some courts, waiver follows from production without more; there
949 is no longer any privilege to assert.

950 A motion was made to adopt "(4) any issues relating to assertion of privilege."

951 It was suggested that this form could be combined with some parts of the other variations,
952 including such elements as entry of an order confirming the parties' agreement.

953 Another suggestion was that this provision should include work-product protection. Some
954 courts and lawyers will assume that work-product protection is covered even if the rule refers only
955 to "privilege"; it is not uncommon to refer to trial-preparation materials as protected by a qualified
956 privilege.

957 The stripped-down version proposed by the motion was challenged on the ground that the
958 rule should refer expressly to the opportunity to assert privilege after production. The purpose is to
959 ease production in discovery by protecting against waiver by producing. The "confirming the
960 parties' agreement" alternative is desirable.

961 A broad reminder was provided. The proposals related to privilege waiver began by
962 wondering whether a rule could be crafted to provide full protection against all the world. But
963 concerns were expressed that such a rule might be seen to "modify an evidentiary privilege" within
964 the meaning of 28 U.S.C. § 2074(b), so that it could take effect only if approved by an Act of
965 Congress. This question has not been resolved. Instead, it seemed better to avoid testing the limits
966 imposed by § 2074(b). The published rules do, however, plant a seed. They are not clear on the
967 extent to which court approval of the parties' agreement might expand the agreement's affects to
968 nonparties. The path of caution could be followed further, adding "the right to assert privilege after
969 production as against the other parties to the agreement." Without this limit, the published proposal
970 invites the parties to adopt agreements that speak to third parties. Judges will be reluctant to enter
971 orders confirming such agreements.

972 It was observed again that the problem is subject-matter waiver. Protecting against waiver
973 can expedite discovery. The published proposal "is not aggressive." It well may be that § 2072
974 enables a more vigorous approach that, in order to facilitate civil discovery and govern the
975 consequences of court-compelled disclosures, defeats waiver claims by anyone, party or nonparty.
976 But the Committee has chosen not to test those possibilities.

977 Speaking of protection, as in the published proposal, was defended on the ground that this
978 concept does no more than support an argument to other courts that their own privilege law should
979 be developed to give effect to the nonwaiver agreement and order. The central focus is to get party
980 agreement. It was protested, however, that this explanation "gives an argument, not protection." A
981 partial response was that the proposal attempts to say that an agreement is helpful as among the
982 parties to the agreement. The rule cannot promise protection elsewhere. If the Committee Note
983 makes it clear that the rule cannot assure the outcome of waiver arguments made in other courts by
984 persons not parties to the agreement, the rule text is not misleading.

985 The last observation was expanded by observing that the Committee has an institutional
986 interest in being clear.

987 The motion was renewed to substitute: "(4) any issues relating to assertion of privilege." The
988 motion failed, 5 Yes, 7 No.

989 An alternative was proposed. In its first form, it was: "(4) any issues relating to assertion of
990 privilege, including whether on agreement the parties may request the court to confirm their
991 agreement." This was met by a motion to adopt the second alternative on footnote 8, with a modest
992 change:

993 (4) any issues relating to assertion of privilege, including whether the court should
994 enter an order confirming any agreement the parties reach regarding the right to assert
995 assertion of privilege after production of information to a party.

996 This motion was approved, 9 Yes, zero no. It was agreed that the Committee Note and Rule 16(b)(6)
997 would be conformed to this version. Consideration must be given to each place where the
998 Committee Notes now refer to "protection." In this vein, support was voiced for the alternative
999 sentence suggested at footnote 16, page 39 of the agenda materials: "Court adoption of the chosen
1000 procedure by order may advance enforcement of the parties' agreement."

1001 At the close of the later discussion of Rule 26(b)(5), it was agreed that Rule 26(f)(4) should
1002 be amended in parallel with the Rule 26(b)(5) proposal by adding a reference to trial-preparation
1003 material. The result would be something like this:

1004 (4) any issues relating to assertion of privilege or protection of trial-preparation
1005 materials, including whether the court should enter an order confirming any
1006 agreement the parties reach regarding the assertion of privilege or trial-preparation
1007 protection after production of information to a party.

1008 *Rule 26(b)(5)(B)*

1009 Proposed Rule 26(b)(5)(B) would establish a procedure for a party who has produced
1010 information in discovery to assert privilege after production. The published proposal read:

1011 **(B)** When a party produces information without intending to waive a claim of privilege it
1012 may, within a reasonable time, notify any party that received the information of its
1013 claim of privilege. After being notified, a party must promptly return, sequester, or
1014 destroy the specified information and any copies. The producing party must comply
1015 with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling
1016 by the court.

1017 In response to the public testimony and comments, a revised version was prepared for
1018 consideration by the Committee. The version in the agenda materials read:

1019 **(B)** When a party produces information without intending to waive a ~~claim of~~
1020 privilege claim, it may, within a reasonable time, notify any party that
1021 received the information of the basis for its privilege claim of privilege.
1022 After being notified, a party must promptly return, sequester, or destroy the
1023 specified information and any copies and may not disclose the information
1024 until the privilege claim is resolved. A receiving party may promptly present
1025 the information to the court under seal for a determination of the privilege
1026 claim. [If the receiving party disclosed the information before being notified,
1027 it must take reasonable steps to retrieve it.] The producing party must comply
1028 ~~with Rule 26(b)(5)(A) with regard to the information and preserve it the~~
1029 ~~information until the privilege claim is resolved pending a ruling by the court.~~

1030 Footnotes to the agenda book draft presented several drafting alternatives.

1031 Judge Rosenthal opened discussion of the privilege-recapture procedure by observing that
1032 the revised version carries forward the basic form and scope of the published version. The changes
1033 are not basic, but respond to refinements suggested by the public comments. In part, the changes
1034 shift into rule text matters that were covered in the published Committee Note. Four of the changes
1035 were noted. The rule now describes the receiving party's opportunity to present the information to
1036 the court for a ruling on the questions whether it is privileged and whether any privilege has been
1037 waived; many comments suggested that the rule should recognize this opportunity, lest it be argued
1038 that any such effort is inconsistent with the obligation to return, sequester, or destroy. The producing
1039 party is required to state the basis for its privilege claim; this facilitates the receiving party's
1040 presentation of the claim to the court. The rule text now states, as in the published Committee Note,
1041 that the receiving party may not disclose the information after being notified of the privilege claim.
1042 And the bracketed material, if adopted, would require the receiving party to take reasonable steps
1043 to retrieve the information if it was disclosed to others before receiving notice of the privilege claim.

1044 A few more changes were included in a text prepared in response to early comments on the
1045 agenda-book version, and presented at the beginning of the discussion:

1046 (B) Information Produced. When a party produces information without intending to
1047 waive a claim of privilege, it may, within a reasonable time, notify any party
1048 that received the information of the claim and the basis for it. After being
1049 notified, a party must promptly return, sequester, or destroy the specified
1050 information and any copies it has and may not use or disclose the information
1051 until the privilege claim is resolved. A receiving party may [also] promptly
1052 present the information to the court under seal for a determination of the
1053 privilege claim. [If the receiving party disclosed the information before being
1054 notified, it must take reasonable steps to cooperate with the producing party's
1055 efforts to retrieve the information.] The party must preserve the information
1056 until the privilege claim is resolved.

1057 Judge Rosenthal also noted that two important questions have not been reflected in these
1058 drafts, except in the footnote discussions. One is whether the "reasonable time" feature, which
1059 appears to be a functional limit on the opportunity to demand return, actually is misleading because
1060 it has no operating meaning. The other is whether the rule should be expanded to include claims to
1061 protect trial-preparation materials. If work-product materials are added here, the Committee should
1062 consider whether to add an explicit reference as well to proposed Rule 26(f)(4).

1063 Professor Marcus described some of the footnote questions. One suggests a way to add
1064 work-product materials to the rule. A second asks whether the rule text should require that the
1065 producing party's notice to the receiving party be in writing; the Committee Note says that writing
1066 is important, but recognizes that it is not always possible. He also observed that the agenda-book
1067 version imposes a potentially heavy burden on the receiving party by requiring the receiving party
1068 to take reasonable steps to retrieve material disclosed to others before receiving notice. The
1069 alternative in the handout calls only for reasonable steps to cooperate with the producing party's
1070 efforts to retrieve the materials. That seems a lesser burden, but it may lead a producing party to
1071 argue that it has a right to do the retrieving and that the receiving party must disclose the persons
1072 who received the information, infringing on the receiving party's work-product interests.

1073 Initial discussion of the work-product question noted that the pressures that led to proposal
1074 of 26(b)(5)(B) focus primarily on privileged material. The pressure is not as great with respect to
1075 work-product material. But the framework can easily include work-product material; is there any
1076 good reason not to include it? It was agreed that the law of waiver with respect to the subject-matter
1077 of the disclosed information is not as troubling with respect to work-product materials as it is with
1078 respect to privileged materials, but waiver is still an issue. And although there are likely to be fewer
1079 circumstances in which it is difficult to recognize the work-product character of discovery materials,
1080 the problem can arise. Normal turn-over in a large corporate legal staff, for example, can easily
1081 mean that a lawyer responding to discovery may not recognize that the person who prepared five-
1082 year old materials was a lawyer. The practicing bar, moreover, thinks of privilege and work-product
1083 protection as linked together; they are often argued together as alternative bases for protection. The
1084 very caption of Rule 26(b)(5), further, refers to trial-preparation materials. A motion to add trial-
1085 preparation materials to 26(b)(5)(B) was made but deferred for action after discussion of other
1086 issues.

1087 The "reasonable time" words became the focus of discussion. It was suggested that these
1088 words appear to be a limitation — a notice that is not given within a reasonable time is a nullity. But
1089 on closer examination, it is the words themselves that are null. A producing party will always send
1090 the notice, even if it recognizes that it has delayed unreasonably. And the underlying waiver law
1091 may encourage this — in California, for example, it is almost impossible to waive work-product
1092 protection by delay in requesting return after production. The receiving party, on getting notice, will
1093 understand that it is obliged to take the steps specified in (b)(5)(B). The party cannot use the
1094 material; must return, sequester, or destroy it; and must do something — what depends on which
1095 form of the proposal might be adopted — to retrieve the material from anyone to whom it has been
1096 disclosed. The only possible effect of the "reasonable time" words is to suggest a waiver rule, that
1097 unreasonable delay in giving notice waives the asserted privilege or protection. Yet the Committee
1098 has concluded that it is better not to attempt to address waiver. There have been vigorous
1099 discussions of the wisdom of addressing waiver, and some comments have suggested that a rule that
1100 directly affects the waiver determination can take effect only if approved by Congress under 28
1101 U.S.C. § 2074(b).

1102 These observations concluded by suggesting that the rule would remain effective if the
1103 reasonable-time words were removed. It still would establish a procedure for addressing privilege
1104 and waiver questions in an orderly way. The producing party is told to give notice, and notice of a
1105 certain quality. The receiving party is told how to respond to the notice, including the option to
1106 present the information to the court under seal for a ruling.

1107 Agreement was expressed by noting that the published rule seems to leave it to the receiving
1108 party to ignore a notice it concludes was not given within a reasonable time. That is not what the
1109 rule should do.

1110 It also was observed that the rules of professional responsibility address these issues. And
1111 those rules do not include time limits for giving notice.

1112 A different perspective was taken in observing that "reasonable time" gives too much
1113 opportunity for delay. Practice is to give notice immediately on discovering the mistake. Either the
1114 rule should require that notice be given promptly or it should remove any time reference.

1115 A familiar question was revived by asking "a reasonable time from what"? From production?
1116 Or from realizing the problem? Perhaps we should define reasonable time to run from production.
1117 And then we should determine whether we should use the same approach for work-product

1118 materials. In response, the discussion reviewed all the problems that have been noted with choosing
1119 among possible events to trigger the reasonable-time requirement. Setting the time from production
1120 offers little benefit in relation to the purpose to facilitate discovery by ensuring a procedure to
1121 address waiver questions, unless perhaps the time is quite long. Setting the time from realization
1122 that privileged material was produced might allow the claim to be pursued at a time that seriously
1123 disrupts the receiving party's trial preparation or even trial presentation. Choice of a specific trigger
1124 also invites consideration of a specific time period, although the reference could be to a reasonable
1125 period. There even can be questions whether the time should run forward from a specific event, such
1126 as production or the close of discovery, or backward from an event, such as trial.

1127 But, it was asked, why not require action promptly after the producing party actually learns
1128 of the privilege claim? We could require notice "promptly after learning that the material is subject
1129 to a claim of privilege." One response was that this allows undue delay; a producing party should
1130 have a continuing obligation to ensure that nothing privileged has been produced. At the same time,
1131 it is appropriate to preserve the "status quo" by requiring the receiving party to stop use for a brief
1132 period after getting notice.

1133 The question was renewed — what difference does it make under the proposed rule if the
1134 notice is not given within a reasonable time? One answer was that we should not have an unlimited
1135 opportunity to give notice. Another response was that many courts consider delay in asserting
1136 privilege in determining whether the privilege has been waived.

1137 But it was responded that under current practice a producing party can make the claim at any
1138 time. The rule should be the same.

1139 This argument was countered by arguing that if the rule says nothing about timeliness of
1140 notice, it will raise concerns about undue delay. And there also may be confusion whether a rule that
1141 sets no time limit on notice implicitly suggests that delay does not enter the waiver determination.

1142 A mid-discussion summary observed that the role of the reasonable-time element is difficult
1143 to articulate. As the discussion has evolved, many participants have attempted to reduce it to a
1144 purely hortatory behest. On this approach, (b)(5)(B) establishes a procedural framework for orderly
1145 presentation and disposition of the privilege and waiver issues. The "reasonable time" limit has no
1146 operating effect. The receiving party must comply with all the (b)(5)(B) requirements on receiving
1147 notice, no matter when it is given. But the cost of compliance is mollified by expressly recognizing
1148 that the receiving party can present the issues to the court. This presentation is facilitated by
1149 requiring that the notice state the basis for the privilege claim. Any delay in giving notice, no matter
1150 how measured, would be nothing more than one element in a waiver determination if the question
1151 arises under law that considers delay in the waiver calculus. But if that is the intent, it is better to
1152 omit "within a reasonable time." So long as it appears in the rule text, no matter what the Committee
1153 Note says, some lawyers and some courts will attempt to give it meaning. The meaning may be that
1154 a producing party is discouraged from giving notice for fear it has delayed unreasonably; it may be
1155 that a receiving party is encouraged to ignore a notice it thinks unreasonably delayed; it may be that
1156 a court believes that delay makes the notice ineffective and never addresses the privilege or waiver
1157 questions; it may be that a party or a court believes that the rule is intended to direct that a court find
1158 waiver if notice was not given within a reasonable time. On the other hand, if "within a reasonable
1159 time" is meant to have some meaning, it remains to decide just what that meaning might be.

1160 Another member repeated the earlier suggestion that the rule should provide that a party may
1161 give a privilege-retrieval notice promptly after it discovers that it has produced material that it
1162 believes to be privileged. The notice would impose the stand-still requirements in the rule.

1163 Separately, it was observed that the Committee Note should explain the relationship between
1164 (b)(5)(B) and any agreements the parties may make as to recapturing privileged materials. At least
1165 in most circumstances, the agreement should prevail. If the parties agree that notice can be given
1166 at any time, that should control — unless, perhaps, the court finds that its own interests supersede
1167 the agreement, as if denying use of the material would impede an imminent or ongoing trial. If the
1168 parties agree that notice must be given by a specified time, the agreed deadline should control.

1169 It also was suggested that if the rule requires notice within a reasonable time, or prompt
1170 notice, or sets some more specific time line, it should be made clear that failure to give notice as
1171 required does not of itself establish waiver. The rule is not designed to change the waiver rule in any
1172 way, whatever the waiver rule may be.

1173 This observation was extended by the suggestion that the purpose of (b)(5)(B) is to facilitate
1174 expeditious discovery. The hope is that an explicit procedure to recapture privileged material will
1175 enable a producing party to expedite the screening process, weeding out the materials whose
1176 privilege status can be identified with reasonable effort but not attempting to examine the more
1177 esoteric privilege possibilities. This can prove workable because the materials subject to a non-
1178 obvious privilege protection are not likely to be important; production is feared because of subject-
1179 matter waiver, not because of the material's intrinsic importance. But it is difficult to do that. An
1180 attempt to extend privilege requires cooperation with the Evidence Rules Committee, and affirmative
1181 congressional approval. Even an attempt to affect waiver-by-production is likely to provoke similar
1182 protests, whether or not they are correct. So, it was suggested, the rule text could require notice
1183 promptly after discovering the privilege claim, while the Committee Note could explain the limited
1184 scope of the rule.

1185 One member asked again what a party is to do if it gets notice but believes the notice was not
1186 given within a reasonable time, or was not prompt, or did not comply with whatever other timeliness
1187 requirement may be adopted. Again the response from another member was that the receiving party
1188 should be obliged to comply with the "hold" imposed by (b)(5)(B).

1189 Fears that tardy notices will disrupt progress toward trial were addressed by noting that under
1190 most law, a delay in asserting privilege supports a waiver finding.

1191 An opponent of "within a reasonable time" suggested that the rule be revised by striking out
1192 those words and imposing an absolute duty to give notice: "When a party produces information
1193 without intending to waive a claim of privilege, it may, must within a reasonable time, notify any
1194 party that received the information * * *." But "must" was resisted as "too strong." The producing
1195 party may prefer to ignore the issue — among other things, if the receiving party fails to perceive the
1196 possibility of privilege and waiver there is little risk of subject-matter waiver.

1197 It was asked whether it would be simpler to require the producing party to file a motion,
1198 bypassing the notice step. The answer was that ordinarily these questions are resolved between the
1199 parties without a motion. Common practice is to return assertedly privileged materials immediately
1200 on being asked.

1201 A different question addressed the foundation of (b)(5)(B) — the requirement that the
1202 information have been produced "without intending to waive a claim of privilege." It would be
1203 better to refer to producing information "that the producing party believes is subject to a claim of
1204 privilege." We do not want to focus on "intent" because that also is an element of the waiver
1205 determination in many courts.

1206 Then it was asked whether the rule should be limited to privilege claims made by a party.
1207 A nonparty may, in discovery, produce information that a party believes is privileged; indeed there
1208 may be a conflict of interests. In an action against a corporation, for example, a former officer may
1209 produce material that is protected by the corporation's privilege. Or the corporate party may produce
1210 material that the former officer believes is privileged. Rule 45 was brought into the discussion: it
1211 enables a nonparty who wishes to make a belated privilege claim to invoke a procedure adopted
1212 verbatim from 26(b)(5)(B). The analogue to 26(b)(5)(B) is 45(d)(2)(B). All of the published
1213 proposals to amend Rule 45, indeed, will be revised to conform to the changes ultimately made in
1214 Rules 26 and 34.

1215 It was suggested that the rule might begin:

1216 If information is produced in discovery that is subject to a claim of privilege, a party
1217 claiming privilege may notify any party who received the information of the basis for
1218 its claim * * *.

1219 This proposal, which eliminates "within a reasonable time," was adopted without dissent.

1220 Attention turned to some of the changes proposed in the version handed out at the meeting.
1221 One requires the receiving party to return, sequester, or destroy any copies "it has." The idea is that
1222 it would impose an undue burden to require that one of these alternatives be accomplished with
1223 respect to copies the receiving party no longer has. Another addition makes explicit a requirement
1224 that was implicit in the direction to return, sequester, or destroy: the receiving party may not use the
1225 information after being notified.

1226 The next question addressed the bracketed language in the agenda-book proposal: "If the
1227 receiving party disclosed the information before being notified, it must take reasonable steps to
1228 retrieve it." An alternative might be: "must take reasonable steps to cooperate with the producing
1229 party's efforts to retrieve the information." A concern was expressed in the opening discussion that
1230 a duty to cooperate might require the receiving party to identify recipients and thus reveal
1231 information about its trial-preparation efforts. This concern might be passed by. Or the Note could
1232 address it, perhaps saying that the receiving party need not reveal the identity of recipients if it
1233 undertakes to notify them and seek return of the information.

1234 An alternative to cooperation in retrieval efforts might be a simple requirement that the
1235 receiving party notify the persons who received the information from it. The notice would direct
1236 them not to use or disclose the information.

1237 Discussion of retrieval led to the observation that often the person receiving a document is
1238 outside the court's jurisdiction. Inevitably, the retrieving burden will fall on the producing party —
1239 it cannot rely on the receiving party for diligent efforts. For that matter, it may be asked whether it
1240 is fair to impose any significant retrieval burden on a party who innocently received information that
1241 the producing party failed to screen adequately in the first place. Even a duty to cooperate with the
1242 producing party is complicated. Perhaps the agenda-book proposal has it right: the receiving party
1243 is obliged to take reasonable steps, no more.

1244 Electronic information and its dissemination will complicate any retrieval obligation. How
1245 do you actually get the information "back"? Sequestration, a prohibition on use, seems sufficient.
1246 Lawyers act honorably in these matters, and will observe a sequestration. Notice will stop further
1247 disclosure or use.

1248 It was suggested that the rule should require the receiving party, after notice of the privilege
1249 claim, to "take reasonable steps to notify recipients of the information not to use or disseminate the
1250 information."

1251 A motion was made to adopt the agenda-book proposal, at p. 14 lines 29-31:

1252 If the receiving party disclosed the information before being notified, it must take
1253 reasonable steps to retrieve it.

1254 The motion was adopted with 8 votes in favor; 4 votes were cast for the alternative that would
1255 require reasonable steps to notify recipients. It was agreed that the Note should not attempt to
1256 describe what may be entailed by "reasonable steps to retrieve."

1257 It was asked whether a party can use a document that shows on its face that there is no
1258 alternative means of obtaining the same information. An answer was offered that the receiving party
1259 can present the information to the court under seal for a ruling. But that led to the question whether
1260 a seal should be required, pointing out that it may be possible to make a motion without revealing
1261 the information. The rule only says that the receiving party "may" "promptly present the information
1262 to the court under seal." If a motion can be made without presenting the information, the seal is not
1263 required. The Note could say that if the motion can be made without presenting the information, a
1264 seal is not required. It was agreed that the rule text should remain as proposed. The question
1265 whether the Note should discuss the possibility of moving without presenting the information was
1266 left open.

1267 The question of addressing trial preparation materials to Rule 26(b)(5)(B) came next. It was
1268 agreed that "trial-preparation materials" is the better rule language because that is the language of
1269 the captions for Rule 26(b)(3) and (4); "work-product" is not rule language. Although the published
1270 proposal was framed in the belief that there is less need to establish a recapture procedure for trial-
1271 preparation materials, parallel treatment is justified because work-product and privilege issues are
1272 frequently joined. It was agreed by unanimous vote that 26(b)(5)(B) will be expanded:

1273 If information is produced in discovery that is subject to a claim of privilege or
1274 protection as trial-preparation material, a party [claiming privilege or
1275 protection] {making the claim} may notify any party who received the information
1276 of the basis for the claim * * *.

1277 Rule 26(f)(4) will be considered for parallel revisions, perhaps to read:

1278 (4) whether, on agreement of the parties, the court should enter an order protecting
1279 the right to assert privilege or protection of trial-preparation material after
1280 production;

1281 (This language was further revised to conform to the revisions of Rule 26(f)(4) described above.)

1282 During the comment period, suggestions were made that Rule 26(b)(5)(B) should require a
1283 receiving party to certify sequestration or destruction if it does not return the material, or to certify
1284 that all copies have been returned. It was agreed by consensus that certification should not be
1285 required.

1286 A frequent suggestion during the public comment period was that the notice of privilege or
1287 work-product protection should be in writing. The published Committee Note says that writing is
1288 useful, but is not required. Establishing a writing requirement in the Rule text might be awkward
1289 in some circumstances; the familiar example is a privilege issue that is framed for the first time

1290 during a deposition. Lawyers will routinely provide a written memorial whenever that is possible.
1291 And it does not seem suitable to say in the rule text that written notice is required and then offer
1292 contradicting advice in the Committee Note that in some circumstances unwritten notice suffices.
1293 A motion to stick with the published "notify," without adding "in writing," passed 9 yes, 3 no.

1294 *Rule 26(b)(2)(B)*

1295 Judge Rosenthal introduced rule 26(b)(2)(B) by noting that for several weeks before the
1296 meeting there had been much discussion within the Committee and preparation of interim drafts.
1297 Further changes have been proposed since the agenda book was circulated. A new draft was
1298 distributed. In its initial form, it read:

1299 A party need not provide discovery of electronically stored information from sources
1300 that the party identifies as not reasonably accessible without undue burden or cost.
1301 On motion to compel discovery or for a protective order, the responding party must
1302 show that the information is not reasonably accessible without undue burden or cost.
1303 If that showing is made, the requesting party may obtain an order for discovery of the
1304 information by showing that it is consistent with Rule 26(b)(2)(C). The court may
1305 specify terms and conditions for such discovery.

1306 As compared to the published version, this draft amplifies "not reasonably accessible" by
1307 pointing to cost and burden as the measures of reasonable access. Many participants in the public
1308 comment period expressed this understanding of reasonable accessibility. This draft also addresses
1309 another matter that provoked extensive comment. The "good cause" concept in the published
1310 version was viewed by many as an indirect invocation of the proportionality factors set out in current
1311 Rule 26(b)(2). This draft dispenses entirely with "good cause," aiming directly at these
1312 proportionality factors through the cross-reference to what would be redesignated as subparagraph
1313 (C).

1314 Changes also have been made in the Committee Note. These changes reflect not only the
1315 revised rule text but also matters not touched in the rule text. Several comments express concern
1316 that a party's unilateral designation of material as not reasonably accessible will be thought to mean
1317 that it is not "discoverable" within the meaning of the safe-harbor provisions of proposed Rule 37(f),
1318 so that it need not be preserved. The revised Note observes that a Rule 26(b)(2)(B) designation does
1319 not of itself exempt the information from preservation. Preservation requirements are not addressed
1320 by the proposed e-discovery amendments, in this way or any other.

1321 A closer description of this draft, and an alternative, followed.

1322 The agenda book draft, as further revised, begins by referring to information "from sources"
1323 that are not reasonably accessible. This change responds to the objection that information cannot
1324 be identified by a party who does not know what the information is, nor even whether it actually
1325 exists. The point is to identify the sources that have not been searched. The draft also substitutes
1326 for a motion by the requesting party a motion either to compel discovery or for a protective order,
1327 recognizing that the party asked to produce information may wish to take the lead in clarifying its
1328 search responsibilities. The agenda book draft also included as a possible option an explicit
1329 suggestion that the court might order a requesting party to pay part or all of the reasonable costs of
1330 accessing the information as a condition of discovery. This option was deleted from the more recent
1331 draft; several Committee members had concurred in the recommendation that it is better to leave
1332 cost-sharing to the Committee Note as an illustration of the terms that may be imposed on ordering
1333 discovery.

1334 The agenda book also includes an alternative draft that departs more dramatically from the
1335 published version. The departures all are matters of expression; the underlying concepts are the
1336 same as those expressed in the published draft as refined by work in response to public comments.
1337 The goal was to achieve a draft that could be recommended for adoption without republication, while
1338 speaking still more directly to the nature of the underlying practices. In clean form, this draft read:

1339 In responding to a discovery request, a party need not search sources of electronically
1340 stored information that may be responsive if the party identifies the sources and
1341 describes the substantial barriers that impede access to the information. On motion
1342 to compel discovery or for a protective order, the responding party must show the
1343 nature and extent of the barriers that impede access. If substantial barriers are shown,
1344 the court may order discovery of the information if the requesting party shows that
1345 discovery is consistent with Rule 26(b)(2)(C) and may specify terms and conditions
1346 for such discovery.

1347 As compared to the drafts that hew closer to the published proposal, this draft makes several
1348 substitutions. (1) Rather than say that a party need not provide discovery, it looks directly to the
1349 underlying problem: the party need not search some sources. (2) The draft refers to sources of
1350 information "that may be responsive." No one would benefit from a requirement that the responding
1351 party name all of the sources of information that are difficult to search; the only matter of interest
1352 is sources that may include information responsive to the request. (3) Rather than refer to reasonable
1353 accessibility, the draft refers to "substantial barriers." This choice is made in order to separate out
1354 two separate inquiries. The first seeks to determine just how difficult it is to find out what these
1355 sources actually contain. The second asks whether the discovery needs of the action justify a search
1356 of these sources in light of the demonstrated difficulty. A reference to "reasonable" accessibility
1357 seems to anticipate the second question, to set up a two-stage process in which the first stage closely
1358 resembles the second stage, looking to cost and burden in relation to the reasonable discovery needs
1359 of the case. The reference to "barriers" was chosen as a neutral description of elements that may
1360 result from software limitations or hardware limitations; other words, such as "impediments" or
1361 "difficulties" might be used if "barriers" seems too arcane. (4) In the same stage, the burden on the
1362 requesting party is to show the nature and extent of the barriers. If "substantial barriers" are shown,
1363 the requesting party moves to the second stage by showing a need for the information that justifies
1364 at least some search attempt.

1365 This alternative draft was not discussed further, apart from a few incidental reflections.

1366 It was noted that the (b)(2)(B) proposal generated substantial concern during the public
1367 comment period.

1368 A motion was made to adopt the draft presented at the meeting. This "two-tier" approach to
1369 discovery of electronically stored information is important. To be sure, the "undue burden or cost"
1370 criteria are expressed in present Rule 26(b)(2), and several comments suggested that the present rule
1371 provides protection enough. But a better-developed rule is important to raise consciousness about
1372 electronic discovery problems and limits. This proposal may be the most important part of the
1373 package, focusing attention on the most important characteristics that make discovery of
1374 electronically stored information different from discovery of traditional documents. As revised, the
1375 draft puts a greater burden on the producing party than resulted from the published draft. It now
1376 makes specific the need to assert undue burden or cost as the foundation for asserting that the
1377 information is not reasonably accessible. This is better than the uncertainties conjured up by such
1378 alternative phrasing as "substantial barriers." The redrafting makes the rule much better.

1379 It was asked how the motion for a protective order would work. The purpose is to enable the
1380 party responding to a discovery request to seek a determination of the extent of its search obligations
1381 if it cannot work the matter out with the requesting party. It was observed that the draft's reference
1382 to a "responding" party was potentially obscure. But to the extent this party invokes the protection
1383 of (b)(2)(B) it is not yet a "producing" party. It was concluded that the draft should be revised: "On
1384 motion to compel discovery or for a protective order, the responding party from whom discovery is
1385 sought must show * * *."

1386 A judge observed that the parties will know more about the accessibility issues than the judge
1387 does. This observation was accepted with the further observation that it is the parties' responsibility
1388 to educate the judge when they are not able to resolve among themselves the extent of the proper
1389 search obligation. In turn, it was asked whether the Committee Note should recognize the judge's
1390 authority to appoint a special master to govern the discovery process. The response was that the
1391 Note should not be made into a "Manual for Electronic Discovery." A perpetual dilemma in drafting
1392 Committee Notes arises from the conflict between the desire to capture much of the useful
1393 information gathered in the public comment process, along with practice pointers, and the conflicting
1394 need to preserve the flexibility of the rule text to accommodate to the circumstances revealed by
1395 actual practice over the years. And Committee Notes should not become too long.

1396 It was asked whether "reasonably" should remain in the rule text now that "without undue
1397 burden or cost" would be added. Undue burden or cost seem to have become the definition of
1398 "reasonably," dispensing with the need to say "reasonably." It was concluded that it would be better
1399 to draw a causal nexus. The expression will be "not reasonably accessible without because of undue
1400 burden or cost" in both places where these words appear.

1401 The need for any version of published Rule 26(b)(2)(B) was challenged. It was said that a
1402 party who is not going to search a source of potentially responsive information will come forward
1403 with this decision now. "The existing process is extremely flexible." The comments tell us this is
1404 how people do it now. There is no indication that judges are insensitive to these problem. No one
1405 has testified to any benefit that would be realized by amending the rules. And strong observations
1406 were made that a party should not be required to reveal specific sources of electronically stored
1407 information. Beyond that, there was much disagreement as to what is meant by "not reasonably
1408 accessible." The ABA survey showed a wide divergence of understandings, and often showed
1409 widespread ignorance as well. Many respondents, for example, thought that information in personal
1410 digital assistants is not reasonably accessible; commonly it is. The magistrate judges oppose the
1411 proposal. The proposed procedure truncates the burden of proof. And the alternative draft "has only
1412 a passing resemblance to what was published."

1413 Sympathy for this view was expressed, but in terms that supported the revised proposal. The
1414 revisions clarify what "not reasonably accessible" means. The rule codifies best practices, and sets
1415 these practices out in one easily accessible place. The two-step process makes sense. And the
1416 Committee Note provides much useful guidance. Codification of good practice in a rule is a proper
1417 object of rules reform.

1418 This support was extended by another member, who observed that "reasonableness does not
1419 give specific answers." It restates the true issue and identifies the obvious ways to present the issues
1420 to the court.

1421 It was noted that the opposition of the magistrate judges association was based on the
1422 responses of the magistrate judges who were able to command the time and interest to respond to
1423 an on-line survey. There also appears to be some misunderstanding of what is intended. We should

1424 not attribute undue weight to this thoughtful and useful attempt to get the views of those who are on
1425 the front line of many discovery disputes.

1426 It was suggested that the reference to an order for discovery despite a showing that
1427 information is difficult to access should be revised: "the requesting party may obtain an order for
1428 discovery of the information not reasonably accessible by showing that the discovery is consistent
1429 with Rule 26(b)(2)(C)." This was resisted as too much abbreviated. Some further statement should
1430 be made of the showing required to justify discovery.

1431 It also was suggested that it would be better to refer to "such information" rather than "the
1432 information." But it was observed that it would better to recognize that the sources not searched may
1433 hold responsive information but also may not. "the court may order discovery from such sources of
1434 such information * * *."

1435 Then it was asked how a requesting party is expected to show that discovery is consistent
1436 with Rule 26(b)(2)(C). These provisions are drafted as criteria for limiting discovery, not as criteria
1437 for granting discovery. The idea is that the requesting party must show reason to overcome the
1438 burdens and costs of the search, considering the burdens and costs but also considering the
1439 information that is available by other discovery. It may appear that without the costly search there
1440 is little or no information available on important subjects. It also may appear that the difficult
1441 sources are likely to have responsive information. Or the converse may appear — other discovery
1442 may have produced great volumes of information, there is no particular reason to believe that any
1443 useful information is missing, and the probable yield from searching the difficult sources may seem
1444 trivial. But it remains to decide whether this process can be expressed by a simple cross-reference
1445 to subparagraph (C). Even saying that the court may order discovery "after [upon] considering the
1446 factors in Rule 26(b)(2)(C)" may not convey the idea accurately.

1447 This dilemma was addressed by reviving the reference to "good cause" in the published
1448 proposal: "the court may order discovery from such sources for good cause, considering the
1449 limitations of Rule 26(b)(2)(C). The requirement that the requesting party show good cause provides
1450 a direct link to the subparagraph (C) limits.

1451 The two-step process came under renewed question. This is envisioned as one motion. How
1452 do we separate the showing of the obstacles that impede access, that make search difficult, from the
1453 burden of showing good cause?

1454 The process was explained as one of shifting burdens, but still questioned on the ground that
1455 the proposed language "does not give much guidance; we're boxing in the party who wants
1456 discovery." Why not just end it with "good cause," forgoing any reference to Rule 26(b)(2)(C)? This
1457 reference is new after publication, and is not needed.

1458 The need for the cross-reference was repeated. The published proposal drew many comments
1459 that "good cause" is inherently obscure, and inevitably will be explained — after some initial
1460 confusion — as invoking Rule 26(b)(2)(C) principles.

1461 Further drafting alternatives were explored. The rule might be drafted: "Subject to Rule
1462 26(b)(2)(C), if that showing is made, the requesting party * * *." This formula would better capture
1463 the basic principle of modern discovery that a requesting party gets the information unless a powerful
1464 counterpart showing is made under (b)(2)(C). Or we could say "as limited by Rule 26(b)(2)(C)."
1465 Or "good cause" could be removed again — the only proposed function is to serve as a bridge to
1466 consideration of the limiting principles. "good cause consistent with Rule 26(b)(2)(C)" would be
1467 an alternative. Or "by showing that production should not be limited by application of Rule

1468 26(b)(2)(C)." The difficulty arises because we are directing the requesting party to show an absence
1469 of limitations, to show that discovery is not blocked by (C) factors (i), (ii), or (iii). "good cause"
1470 serves as a bridge, as in the agenda book version, p. 9 lines 20-21: "may order discovery for good
1471 cause when consistent with Rule 26(b)(2)(C)."

1472 All of this discussion prompted a further summary of the apparent difficulty. The reference
1473 to "reasonably accessible without undue burden or cost" in defining the first stage seems to invoke
1474 a balancing process that is difficult to distinguish from the second stage that looks to good cause
1475 consistent with the limiting factors embodied in Rule 26(b)(2)(C). What is "reasonable" depends
1476 on need for the information in light of the search costs and predictions of importance. What is an
1477 "undue" burden or an "undue" cost depends on the same balancing of cost and predicted benefit, no
1478 matter how uncertain the prediction may be. After a court has found that these elements bar
1479 discovery without a further showing, how is it carry forward to find that the same elements do not
1480 after all bar discovery? Why has it not already rejected a "good cause" conclusion?

1481 This question led to a further question — why should we impose this burden on a party
1482 requesting discovery of electronically stored information, but not on a party who requests discovery
1483 of information stored by other means, notably paper? It was responded that this burden should be
1484 on the requesting party precisely because electronically stored information frequently presents access
1485 problems of a kind rarely encountered with paper records. In a wide range of circumstances,
1486 electronically stored information may pass from easily retrieved form to forms that may or may not
1487 be accessible at all, and that can be searched only with great cost. The circumstances in which this
1488 happens continue to change as technology develops and as system designs evolve. It is difficult for
1489 a requesting party to know, at the time of its request, what information may lie, if anywhere, in
1490 sources that are difficult to search. The two-stage process is designed to convey this information to
1491 the requesting party by the initial identification of the sources and an identification of the cost and
1492 burden factors that impede access. The requesting party then can consider the possible need for the
1493 information in relation to the fruits of other discovery and its own investigations, and focus on the
1494 apparent need for further discovery. The parties can then discuss the problem and often will work
1495 out a sensible response. If the parties cannot work it out, the requesting party should undertake to
1496 show justification for the discovery.

1497 This two-stage process can be captured in words that do not seem to saddle the requesting
1498 party with the burden of proving a negative. By a vote of 12 yes to 1 no, the Committee approved
1499 this sentence:

1500 If that showing is made, the court nonetheless may order discovery from such sources
1501 if the requesting party shows good cause, considering the limitations of Rule
1502 26(b)(2)(C).

1503 It was suggested that here may be room for further small editorial revisions; if any are suggested,
1504 they will be included in materials circulated for Committee review before a recommendation for
1505 adoption is made to the Standing Committee. One proposal was that the second and third sentences
1506 could be integrated into one longer sentence. The full rule would read: "A party need not provide
1507 discovery of electronically stored information from sources that the party identifies as not reasonably
1508 accessible without undue burden or cost. If, on motion to compel discovery or for a protective order,
1509 the party from whom discovery is sought shows that the information is not reasonably accessible
1510 without undue burden or cost, the court may nonetheless order discovery from such sources for good
1511 cause shown by the party seeking discovery, considering the limitations of Rule 26(b)(2)(C). The
1512 court may specify conditions."

1513 Committee Note language will be devised to reflect this discussion. Committee members
1514 were invited to make suggestions immediately after the meeting. The Note, for example, must be
1515 revised to reincorporate references to a "good cause" showing. This will tie to the burden described
1516 in the revised rule text, which directs that the requesting party must show good cause.

1517 Earlier discussion was revived by asking whether all of this two-stage procedure would be
1518 accomplished by a single motion. The requesting party will have the information provided by the
1519 responding party when it designates information as not reasonably accessible. But it may not have
1520 the information needed to show good cause at the time of the initial hearing, and in any event may
1521 need discovery to be able to test the actual search burdens and costs, the probability of finding
1522 important information by the search, and for that matter the extent of the information that may be
1523 available by exhausting other discovery opportunities.

1524 The same theme was expanded by observing that most courts have little time to devote to
1525 discovery disputes. If the parties cannot work the matter out without court supervision, the hearing
1526 is likely to consist of a 10-minute telephone conference. That is not a promising vehicle for working
1527 through the complex issues presented by these electronic discovery difficulties.

1528 These comments were countered by noting that they seemed to invite a reopening of the
1529 entire discussion. The published proposal required a showing of good cause to get discovery of
1530 information not reasonably accessible, and it was understood that the burden of showing good cause
1531 lies on the party requesting discovery. Adding words to make the burden explicit does not change
1532 the two-stage process that has been intended from the beginning.

1533 The Committee again approved, again with one dissent, its approval of the formulation
1534 supporting discovery "if the requesting party shows good cause."

1535 It was observed that the current draft Committee Note refers to seven "factors" that will guide
1536 the determination of good cause and consideration of the Rule 26(b)(2)(C) factors. These elements,
1537 however, are not "factors" described in the rule. They are elements that inform application of the
1538 (b)(2)(C) criteria, and are better described by a word other than "factors."

1539 A separate question was raised as to the Committee Note discussion of the relationship
1540 between a Rule 26(b)(2)(B) designation of information not reasonably accessible and the duty to
1541 preserve that information. The agenda book, p. 15 note 7, includes as possible alternative Note
1542 language these sentences:

1543 If the responding party has placed a litigation hold on reasonably accessible
1544 electronically stored information that may be discoverable in the action, information
1545 stored on inaccessible sources generally would not need to be preserved. A
1546 responding party would need to include in the litigation hold information that is not
1547 reasonably accessible if that party had a reasonable basis to believe that it may be
1548 discoverable in the action and was not available from accessible sources.

1549 Interest in this formulation was expressed, with the further observation that "everyone wants to know
1550 about the relationship between (b)(2)(B) and the duty to preserve." But it also was observed that it
1551 goes a long way to say that "information stored on inaccessible sources generally would not need to
1552 be preserved." That may be too specific to include as part of a process that has deliberately refrained
1553 from attempting to prescribe preservation obligations.

1554 It was agreed that the duty to preserve aspects of the Rule 26(b)(2)(B) Committee Note
1555 should be considered in conjunction with the Rule 37(f) text and Committee Note.

1556 A revised Committee Note will be circulated for Committee consideration soon after the
1557 meeting concludes.

1558 *Rule 37(f)*

1559 The agenda book included Rule 37(f) as published for comment, marking with brackets
1560 alternative words that might be considered:

1561 **(f) Electronically Stored Information.** Unless a party violated an order in the action
1562 requiring it to preserve [specific] electronically stored information, a court may not
1563 impose sanctions under these rules on the party for failing to provide such
1564 information if:

1565 (1) the party took reasonable steps to preserve the information after it knew
1566 or should have known the information was [would be] {likely would
1567 be} discoverable in the action; and

1568 (2) the failure resulted from loss of the information because of the routine
1569 operation of the party's electronic information system.

1570 Judge Rosenthal introduced discussion of Rule 37(f) by noting that it had drawn much
1571 attention during the comment period. Criticism was offered from many perspectives. The proposed
1572 variations also have drawn criticism. The rule will apply to all civil actions. But some comments
1573 suggest that it does not go far enough — indeed that it does not accomplish anything. On this view,
1574 no court would ever impose sanctions for the conduct that it purports to protect. That leaves the
1575 question whether the correction is to expand the rule to give greater protection, or instead to abandon
1576 the project.

1577 The question is whether we can, by rule, offer meaningful guidance on the appropriate
1578 response to the discovery problems that can arise from the dynamic character of electronic
1579 information systems. Routine operation can banish information beyond recall or make retrieval
1580 much more difficult. One recurrent issue goes to the state-of-mind element. Many comments
1581 support the view that sanctions should be available only for intentional or reckless failure to preserve
1582 information against routine destruction. Another recurrent issue focuses on the relationship between
1583 Rule 26(b)(2)(B) and Rule 37(f): if a party identifies a source of information as not reasonably
1584 accessible, is it excused from any duty to protect against destruction in the routine operation of its
1585 system? Yet another question is framed by the "reasonable steps" standard of culpability — if the
1586 standard authorizes sanctions for merely negligent conduct, should the Committee Note comment
1587 on the need to calibrate the severity of sanctions to the relative degree of culpability?

1588 The rule text was introduced by observing that it remains much the same as the published
1589 proposal. The Note in the agenda book is expanded to address the relationship between Rule
1590 26(b)(2)(B) and Rule 37(f). Options inserted in the rule text begin with the question whether the
1591 preservation order provision should recognize sanctions only for violating an order to preserve
1592 "specific" information. This option responds to complaints about entry of catch-all preservation
1593 orders that require preservation of "all" electronically stored information. It may be impossible to
1594 comply with such an order — if nothing else, the simple acts of turning a system off and on again
1595 may alter information in the system. In the Rule 26(f)(3) discussion, the Committee approved
1596 Committee Note language advising that a preservation order should be narrowly tailored. The same
1597 approach might be reflected here in rule text. On the other hand, this limitation implies criticism of
1598 the overbroad order, and more than criticism — it seems to say that the order cannot be enforced.

1599 It was noted that the Standing Committee added "under these Rules" to the rule text before
1600 publication. These words have been criticized by comments suggesting that Rule 37(f) would afford
1601 no meaningful protection if sanctions still can be imposed by drawing from authority outside the
1602 rules, and particularly if a court can simply assert "inherent authority" to do what the rule seems to
1603 proscribe.

1604 Another drafting question is raised by the reference to information the party knew "was"
1605 discoverable. Proposed alternatives include "would be" discoverable or "likely would be"
1606 discoverable. The choice may relate in part to the interrelationship with the Rule 26(b)(2)(B)
1607 provisions on information stored in sources not reasonably accessible. Referring to information that
1608 "would be" discoverable may better reflect the obligation to preserve difficult-to-access information
1609 that will become discoverable only if the court finds good cause to order discovery; it may be
1610 difficult to say that such information "was" discoverable at the time the party identified it. On the
1611 other hand, "would be" may create a risk of hindsight judgment. "likely would be" may seem a more
1612 direct description of the litigation-hold calculation we want a party to make, but it may offer too
1613 much protection. (The Committee Note, at page 11 of the agenda book and note 9, also addresses
1614 the relationship between 26(b)(2)(B) designations and the duty to preserve. Preservation obligations
1615 also are addressed in the Committee Note at agenda book page 10, referring to the common-law duty
1616 as well as other preservation obligations.)

1617 Footnote 4 on page 6 of the agenda book addresses the standard of culpability, suggesting
1618 intent or recklessness, and even illustrating an approach that would allow sanctions for violating a
1619 preservation order or an order compelling discovery only if the party acted willfully or recklessly.

1620 Finally, the Committee Note at agenda book pages 15-16 adds language observing that the
1621 severity of sanctions should correspond to the culpability of the responding party's conduct. The
1622 most severe sanctions ordinarily should be reserved for intentional or reckless conduct.

1623 Discussion began by addressing the culpability standard. It was urged that "negligence" is
1624 the standard in the Second Circuit. It is right. "Simple sanctions" should be available to redress the
1625 negligent loss of discoverable information. At least one court in every circuit has recognized the
1626 appropriateness of sanctions in such circumstances.

1627 The offsetting view drew support from a comment submitted by Professor Arthur R. Miller.
1628 The challenge in drafting a safe-harbor provision is that we are dealing with very complex
1629 information systems that delete material even before a party knows whether it is there or whether it
1630 is responsive to a discovery request. The reaction today is to preserve more information than need
1631 be preserved, often at untoward cost. The lawyers are afraid of sanctions. Sanctions may have an
1632 impact on the outcome of the litigation. And they have an impact on a lawyer's career and
1633 professional standing that is not much limited by the seeming severity of the sanction in its own
1634 terms. The result of cautious over-preservation "geometrically increases the costs of discovery." A
1635 reasonableness standard offers little comfort because lawyers fear hindsight determinations of what
1636 is reasonable. A safe harbor that allows sanctions on a negligence standard offers little protection.
1637 And all of this is further complicated by the problem of inaccessible information.

1638 It was responded that courts in every circuit recognize that a party who negligently fails to
1639 protect information against destruction can properly be made to bear the costs of recreating the
1640 information or of additional discovery aimed at retrieving the information (or substitute information)
1641 from other sources.

1642 A further observation was that these problems resemble qualified immunity. It is not only
1643 lawyers but also clients who should be protected against concerns about routine computer operations

1644 that destroy discoverable information. A safe harbor rule should protect against "gotcha" discovery
1645 tactics, against the risk that a requesting party will benefit more from the loss of information than
1646 from the discovery of information. The rule should adopt an intent or recklessness standard, with
1647 the expectation that the question can be reviewed in another five years after experience shows
1648 whether a different standard should be adopted.

1649 The intent or recklessness standard was further supported by stating that it is impossible to
1650 prevent all overwriting. Information is destroyed by the simple act of turning a computer on or off.
1651 The published rule "does nothing; a court will not impose sanctions if you were not negligent." A
1652 party who takes reasonable steps will not be sanctioned if the computer system destroys information.
1653 The comments, moreover, show the need to protect against sanctions "that affect careers or cases."
1654 The provision excluding safe-harbor protection for violation of a court order, moreover, seems to
1655 authorize sanctions even though a party took all reasonable steps to comply.

1656 It was responded that a court should be able to impose sanctions when an order is violated.
1657 But rejoined that a party who takes reasonable steps to comply with an order should be protected.
1658 And sur-rejoined that a court should be able to protect an innocent requesting party against the
1659 prejudice that flows from loss of information caused by failure to comply with a court order.

1660 The dilemma was framed by observing that an "intentional" standard makes life "way too
1661 easy" for a party who fails to preserve information. But the published draft offers no meaningful
1662 protection. "It may be better to do nothing." The negligence standard adds nothing because courts
1663 do not sanction non-negligent conduct. An "intent" standard asks the Supreme Court to adopt a rule
1664 overriding what many courts have found appropriate. Again, the suggestion was that it may be better
1665 to abandon the Rule 37(f) effort.

1666 The attempt to craft a safe harbor was then defended. Beginning with the observation that
1667 it will make litigators nervous, it was suggested that "it aims at 'gotcha' with respect to electronically
1668 stored information." It is well calibrated to balance the competing concerns.

1669 Drawing back a bit, the genesis of the published proposal was explained. A party who
1670 violates an order in the action was excluded from the safe harbor because the Committee did not
1671 want to nullify the court's ability to enforce its order. At the same time, there was concern that this
1672 provision will encourage many litigants to seek preservation orders as a matter of routine, and often
1673 to propose overbroad preservation orders. The standard of culpability when no order is violated
1674 presents a related but separate issue: should sanctions be available whenever the conduct is not
1675 "reasonable"? Or, since the focus is only on routine operations, should a higher standard be adopted?
1676 These issues should be separated for discussion.

1677 The negligence standard was again defended on the ground that a party injured by another
1678 party's negligent failure to take reasonable steps to preserve information should be protected by
1679 sanctions calculated to reduce the prejudice. And it was again attacked on the ground that there is
1680 a risk that a party who does its best still may be found negligent after the event.

1681 A broader question was introduced: should the rule be revised to protect against sanctions
1682 imposed for failure to take reasonable steps to preserve information that was lost for reasons other
1683 than routine operation of an electronic storage system? The response was that a rule this broad
1684 would directly address the duty to preserve information. As much as many litigants would welcome
1685 an explicit preservation rule, the Committee has concluded that the difficulties of drafting a good
1686 rule would be so great that there is no occasion even to consider the question whether a preservation
1687 rule would be an authorized or wise exercise of Enabling Act authority.

1688 The dilemma was then reiterated. A safe harbor should give meaningful, even strong,
1689 protection. But it is difficult to adopt a rule that excuses negligent failure to protect information.
1690 Perhaps a solution can be found by softening the rule to say that "ordinarily" sanctions should be
1691 imposed only for intentional or reckless failure to preserve, etc. This tack might be coupled with a
1692 statement, in rule text or Committee Note, that the central concern is that severe sanctions not be
1693 imposed for merely negligent conduct.

1694 The next suggestion was that violation of an order should impose "absolute" liability, leaving
1695 an intent or recklessness standard for the rest. But it was noted again that this approach will invite
1696 routine applications for protective orders.

1697 The published proposal was defended as "a check list — a warning on what to do when a
1698 case is filed." Preservation issues can be discussed when the parties sit down to talk, but that may
1699 not happen until 30 or 40 days or more after the case is filed. Counsel for a defendant is obliged to
1700 consider a litigation hold from the very beginning. The published rule heightens the obligations.
1701 But it is an interim thing — counsel requesting discovery will seek a preservation order. And the
1702 preservation order may actually help counsel for the producing party, because it makes it easier to
1703 prevail on the client to do what should be done. On balance, the proposal is useful because it forces
1704 the parties to deal up front with these issues.

1705 The published rule also was challenged as worse than no rule. Many comments said that the
1706 first thing to do under this rule will be to get a preservation order. And the orders will be broad. The
1707 result will be that the producing party is worse off. Evidentiary sanctions for violating an order can
1708 be severe. And every sanction is severe in other ways. In the Department of Justice, for example,
1709 every sanction order automatically leads to an investigation; records are made and preserved. The
1710 higher intent standard would help give some value to the rule. Without the higher standard, we do
1711 not want a rule that serves only as a stimulus to seek preservation orders. And a negligence standard
1712 will exert a gravitational pull — it will be the only preservation standard expressed anywhere in the
1713 rules, and will be viewed as a model for all circumstances.

1714 The frequent interrelationships between procedure and professional responsibility were
1715 brought into the discussion by a reminder that intentional destruction of evidence is subject to
1716 professional discipline. We do not need a rule that protects only against that.

1717 An alternative was suggested. This one would pick up the introduction that a court
1718 "ordinarily should not impose sanctions," but would omit any reference to routine operation of a
1719 party's electronic information system — "Ordinarily, a court may not impose sanctions under these
1720 rules on a party for failing to provide electronically stored information unless the party intentionally
1721 or recklessly failed to preserve the information." It was objected that this approach would adopt an
1722 express definition of preservation obligations.

1723 It was asked whether discussion had proceeded to a point making it appropriate to vote on
1724 abandonment of any Rule 37(f) proposal. The suggestion was resisted. Improvement seems
1725 possible. When and if discussion is exhausted at a seeming impasse, it would be better to table Rule
1726 37(f) for further work later. It would be a great disappointment to the bar to abandon the project
1727 completely. These problems drive up litigation costs exponentially. Tabling would mean that Rule
1728 37(f) should be "decoupled" from the rest of the e-discovery package. The other proposals can stand
1729 on their own, and it is important to carry them through the process to adoption without the delay
1730 occasioned by the uncertain prospects of eventually developing a successful Rule 37(f) proposal.
1731 A serious attempt to draft a meaningful safe harbor is important. Indeed, it is possible that an
1732 interruption of present discussion may be followed by fruitful further discussion after other agenda

1733 items are dispatched. There are great advantages in continuing the discussion now, while Committee
1734 members are closely focused on the problems. If there is to be no express rule, these problems will
1735 be resolved on a day-to-day basis in the district courts. Different approaches will emerge. Appellate
1736 review is seldom possible. The practical consequence will be that all litigants will feel obliged to
1737 tailor their preservation behavior to the most demanding standard identified by any reported case or
1738 known practice, for fear that that standard may be applied to them. We should continue to make the
1739 effort.

1740 Discussion was suspended for consideration of remaining agenda items, and then resumed.
1741 The discussion focused on the concepts that might be expressed in a revised Rule 37(f), recognizing
1742 that drafting implementation of the concepts likely must be left for post-meeting work and, in a few
1743 weeks, a meeting by conference call.

1744 Attention was again directed to the alternative draft set out in the agenda book at p. 6,
1745 footnote 4. It was suggested that there was an emerging consensus that the published proposal was
1746 too insipid, and this alternative might prove the foundation for crafting a more robust form of
1747 protection.

1748 One suggestion was that "routine operation" is a mysterious concept. The rule should protect
1749 against an "unintentional" loss so long as there was a "good-faith effort" to avoid loss. The rule also
1750 should provide for sanctions against a person who wilfully violated an order. This was developed
1751 into a proposal:

1752 "Ordinarily, a court may not impose sanctions under these rules on a party for failing
1753 to provide electronically stored information unintentionally deleted or lost solely as
1754 a result of the routine, good-faith operation of the party's electronic information
1755 system."

1756 "unintentionally" was questioned by observing that if the loss resulted from routine, good-
1757 faith operation, it could not be intentional.

1758 A parallel observation was that in framing the rule, the Committee has not supposed that
1759 there is any need to draft in a way that covers such matters as a fire that destroys the system.

1760 It was asked whether "good faith" captures the need to establish a reasonable litigation hold.
1761 A proponent of the good-faith proposal responded that there is an obligation to preserve what you
1762 reasonably know may be needed for the litigation. And it was observed that that is what the
1763 published proposal says: no sanctions are imposed if a party took reasonable steps to preserve the
1764 information. The proponent suggested that such is the problem — the published proposal goes too
1765 far.

1766 The good-faith element was explored from a different angle: is it strict enough that a
1767 producing party will not rely on it in allowing routine data destruction to go on unabated?

1768 A different question suggested that the good-faith proposal seems a modest suggestion that
1769 there is a presumption against sanctions, but we need to be clear on when it is that the presumption
1770 arises.

1771 The proposal was challenged on the ground that if it is designed to give guidance, it should
1772 be softened to say that ordinarily a court "should not" impose sanctions. And "solely" should be
1773 deleted as well. Substitution of "should not" for "may not" was resisted; it leaves too much room
1774 for sanctions.

1775 "Ordinarily" was questioned as not a good word, either in terms of general rule drafting or
1776 in terms of a rule that sets up a presumption. Drawing from Rule 11(c)(1)(A), it was suggested that
1777 it may be better to say "Absent exceptional circumstances."

1778 A mix-and-match approach was suggested: "Absent exceptional circumstances" is robust;
1779 "should not" is weak. Together, a rule saying that "absent exceptional circumstances, a court should
1780 not impose sanctions" may strike the proper balance.

1781 "Should not," however, was again criticized. It strongly implies that the court can order
1782 sanctions, eroding the premise that there must be exceptional circumstances. The result is not a safe
1783 harbor. Instead, everything turns on the perspective of the particular judge. And that will leave us
1784 in the predicament that lawyers and clients must preserve too much, for fear of coming under the
1785 most exacting scrutiny. The premise, it must be remembered, is that the party has acted in good
1786 faith.

1787 It was agreed that "may not" gives more production. "Should not" "is not a safe harbor." On
1788 the other hand, "should not" has the virtue of not fencing off remedial authority.

1789 The concept of "sanctions" also came under scrutiny. Is an order to restore backup takes a
1790 "sanction," or something else? Perhaps the rule should distinguish between "remedial" and
1791 "punitive" sanctions. On this approach, good faith would shield against the most severe sanctions,
1792 but would leave the court free to make orders that seem to adjust for the loss of information. This
1793 distinction, however, was questioned on the ground that almost all of the orders identified as
1794 "sanctions" have a remedial aspect. An adverse-inference instruction, one of the most feared
1795 consequences of failing to preserve information, is at least in part designed to provide a remedial
1796 substitute for the information that was lost. A different approach was taken by the suggestion that
1797 such orders as cost sharing for added discovery designed to make up for the loss of information fall
1798 within the "exceptional circumstances" proviso.

1799 Again, it was suggested that sanctions may be appropriate for negligent loss of information.
1800 And that rather than describe the appropriate order as a "sanction," it could be characterized as a
1801 "discovery order."

1802 The problem of court orders returned. If a court orders a party to stop routine operation of
1803 its system, the party attempts to comply, but there is a failure of internal communication and routine
1804 operation continues to lose discoverable information, can the court order sanctions? Or is this good
1805 faith? Or instead an exceptional circumstance that permits a sanction?

1806 Returning to good faith, it was asked again whether reasonable steps to preserve information
1807 are part of good faith? Should the Committee Note say something about this? A proponent of the
1808 good-faith standard said that good faith lies at a point intermediate between negligence and
1809 recklessness. It assumes the party has a reasonable litigation hold, and did not deliberately use the
1810 system's routine destruction functions. "If you know it will disappear and do nothing, that is not
1811 good faith." Another proponent suggested that there is routine good-faith operation if the system was
1812 not set up for the purpose of destroying litigation information. The first proponent agreed that it is
1813 not good faith if you know the system will destroy information, but suggested that it is good faith
1814 if you attempt to preserve the information. "The line is conscious awareness the system will destroy
1815 information."

1816 A noncontroversial example was suggested. In an individual employment case, it is not good
1817 faith if you give the plaintiff's supervisor a notice to preserve e-mail messages but the supervisor
1818 disregards the notice and no one follows up on the notice. But if you took steps to preserve, and

1819 some of the information was lost notwithstanding those efforts, there is good faith.

1820 It was protested that the proponents of the good-faith approach, when pushed, still seem to
1821 fall back on a requirement that there be reasonable steps to preserve information against routine
1822 destruction. A proponent responded that "good faith" "tries to get between an objective negligence
1823 test and intent — it is in part subjective."

1824 The focus on good faith was questioned on the ground that it "rewards the party who carries
1825 off a good act of indolence or stupidity." State-of-mind proof is difficult. It is better to invoke an
1826 objective reasonableness test. "reasonable operation" does not do it.

1827 The good-faith element was tested from a different direction by asking whether one
1828 component of good faith turns on compliance with preservation obligations arising independently
1829 from common law, statute, or regulation. A proponent of the good-faith test agreed that litigation
1830 hold and preservation requirements "are what they are." But "if you do not know enough to stop
1831 your computer from doing what computers do, that is good faith."

1832 Another observation was that "good faith" seems to capture part of the "intentionally or
1833 recklessly" approach: it implies some level of culpability. You cannot be in good faith, even with
1834 routine operation, if you act intentionally or recklessly.

1835 The "reasonable steps" question was renewed by asking whether the good-faith proposal
1836 abandons the objective inquiry whether a party took reasonable steps to preserve information, noting
1837 that the reasonable steps approach had won strong support throughout a long phase of this project.

1838 It was asked whether "discovery orders" would be carved out as not "sanctions." The
1839 response took the question to be whether the rule should continue to exclude all violations of court
1840 orders from the safe harbor, saying that the exclusion should be dropped because it simply invites
1841 routine applications for preservation orders.

1842 A return to a "should not" formulation was again urged on the ground that this would
1843 counterbalance the ambiguity of "good faith." When sanctions seem appropriate, a court could
1844 invoke them without the need for a refined determination whether there was "good faith." Judges,
1845 moreover, will be better pleased by a rule that does not so tightly confine the sanction authority. But
1846 "may not" was again defended on the ground that "should not" is not a safe harbor. The leeway
1847 provided by "absent exceptional circumstances" gives discretion enough.

1848 The motion was repeated, recommending adoption — subject to drafting "polishments" —
1849 of Rule 37(f) in this form:

1850 Absent exceptional circumstances, a court may not impose sanctions under these
1851 rules on a party for failing to provide electronically stored information lost solely as
1852 a result of the routine, good-faith operation of the party's electronic information
1853 system.

1854 The motion passed, 9 yes, 2 no. The purpose of the motion is to "recouple" the Rule 37(f) proposal
1855 with the package of electronic discovery amendments to be transmitted to the Standing Committee
1856 with a recommendation for adoption. It was agreed that the Advisory Committee would review a
1857 redrafted Committee Note, and any suggested changes in the proposed rule text, before the rule is
1858 transmitted.

1859

Rule 45

1860 The August 2004 publication included revisions of Rule 45 to maintain the parallels between
1861 the nonparty discovery provisions in Rule 45 and the e-discovery provisions to be added to the party
1862 discovery rules. Rule 45 will be adjusted to conform to the recommendations made for adoption of
1863 the other rules, and with them will be sent to the Standing Committee with a recommendation that
1864 they be approved for adoption.

1865

Republication

1866 Toward the conclusion of discussions of the electronic discovery proposals, the Committee
1867 was asked whether the multiple revisions that it will recommend are such departures from the
1868 published proposals as to make it wise to republish the revised proposals for a new round of public
1869 comment and testimony.

1870 An initial response was that changes had been made in the rule text for virtually all of the
1871 published proposals. Some of the changes seem significant. The Committee Notes have been
1872 revised extensively. There are a lot of material changes that would benefit from further comment.
1873 A general republication of the entire package also might avoid the need to separate Rule 37(f) from
1874 the package for republication alone if the final efforts at refinement encounter renewed difficulties.
1875 But this response was conditioned on the observation that the standard for republication is not clear.

1876 The standard for republication is open-ended. The Advisory Committee has discretion about
1877 what it recommends with respect to the Standing Committee's discretionary determination whether
1878 to republish. A common test is whether a "new concept" has been introduced, but that test is itself
1879 flexible. Republication is available, if that seems wise, when there is "any substantial change."

1880 Republication was supported by suggesting that it would entail only a one-year delay in
1881 adoption of the proposals. These are important issues, and still better proposals might emerge given
1882 more time. Further support was offered by noting that practicing lawyers are quickly adapting to the
1883 challenges of electronic discovery; republication will elicit new information about new practices.
1884 In addition, comments on specific language changes might reveal still better ways to express the
1885 basic ideas.

1886 It was agreed that publication generates a lot of useful information. But that proposition is
1887 one without end — multiple stages of publication might each yield improvements. The dynamics
1888 of the process must be taken into account. The Advisory Committee and Standing Committees
1889 change. Great effort has gone into this project, and it may be difficult to sustain the concentrated
1890 focus that has done so much to improve these proposals. The test should be whether there is a "fresh
1891 beginning." The revised proposals all keep within the broad approaches of the published proposals.
1892 The Advisory Committee has learned much in the process, and should be able to act now on what
1893 it has learned.

1894 Related observations noted that the testimony and comments have led to many useful
1895 improvements. But there has been no change in the framework or the basic concepts. Everything
1896 now proposed was discussed in the hearings and comments. The published proposals provoked
1897 exactly what they are aimed to provoke: rich information that both demonstrates the wisdom of the
1898 basic ideas and also shows better ways of implementing them.

1899 Another summary of the process was that there were more than 250 written comments, and
1900 dozens of witnesses at more than three days of hearings. The number of people involved in
1901 preparing the written comments far outstrips the number of comments. Most of the revisions being

1902 proposed "tune the same concepts." The reaction of the bar to republication would be "we've been
1903 there already."

1904 A motion to republish failed, 2 yes, 10 no.

1905 **II RULE RECOMMENDED FOR PUBLICATION**

1906 Proposed new Rule 5.2 is one of a set of rules that would implement the E-Government Act.
1907 The Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees have considered
1908 parallel proposals under the guidance of a Standing Subcommittee chaired by Judge Fitzwater.
1909 Professor Capra, Reporter for the Evidence Rules Advisory Committee, has served as Chief Reporter
1910 for this project, drafting successive "template" rules for consideration by the several advisory
1911 committees. The purpose of the project is to adopt rules that are as nearly identical as possible for
1912 the Bankruptcy, Civil, and Criminal Rules, recognizing that the context of each rules set may at
1913 times justify departures from absolute uniformity. The Appellate Rules Committee seeks uniformity
1914 by a different path, carrying forward on appeal the rules that governed in the district court, and
1915 choosing between the district-court rules as appropriate for original proceedings in a circuit court of
1916 appeals. Professor Capra attended the meeting by telephone.

1917 The Rule 5.2 in the agenda book includes many questions, most of which address the best
1918 means of drafting uniform provisions that will apply across all the sets of rules. Only a few of the
1919 questions ask whether there are distinctive needs that justify Civil Rules provisions different from
1920 the Bankruptcy or Criminal Rules. It was noted that the Bankruptcy and Criminal Rules Committees
1921 had already met; their recommendations came too late to be included in the agenda book, but were
1922 available at this meeting.

1923 Judge Fitzwater noted that for the moment there are three sets of variations on the template
1924 rule. In part the variations reflect adaptations to meet distinctive needs — Civil Rule 5.2, for
1925 example, includes a subdivision addressing social security and immigration cases that has no
1926 counterpart in the Bankruptcy or Criminal Rules. The Subcommittee will consider the global
1927 questions that seem to apply alike to all of the rules.

1928 Professor Capra stated that the E-Government Act requires the rules to be as uniform as
1929 practicable. Variations are permissible when there are reasons for them — for example, the Criminal
1930 Rules require redaction of home addresses, while bankruptcy procedure needs full home addresses.
1931 He further noted that the project for the moment is to approve rules for publication. This is not the
1932 final stage of the project; time remains to make changes during the comment period. He also noted
1933 that the template rule was reviewed by the Style Subcommittee a year ago; quite recently, the Style
1934 Subcommittee has provided another set of suggestions. It is better to consider these suggestions
1935 during the comment period than to attempt to agree on them now.

1936 Professor Capra then provided a quick overview of the rule. The basic provision is
1937 subdivision (a), which calls for redaction of several categories of personal information to protect
1938 privacy in an era of electronic access to court filings. Subdivision (b) establishes exceptions to the
1939 redaction requirement for situations where redaction would be unduly costly or seems unnecessary.
1940 Subdivision (c), unique to the Civil Rules, limits remote public access to filings in social security
1941 and immigration cases. Subdivision (d) recognizes that there is no need for redaction if a filing is
1942 made under seal, and also governs when a sealed filing is later unsealed. Subdivision (e) allows the
1943 court to order redactions not required by subdivision (a), or to limit remote access by nonparties in
1944 situations outside subdivision (c). Subdivision (f), following the dictate of the E-Government Act,
1945 provides that a party who makes a redacted filing may also file an unredacted copy under seal.
1946 Subdivision (g) allows a party who makes a redacted filing to file a reference list that identifies each

1947 item of redacted information and specifies an appropriate identifier that corresponds to each item
1948 listed. This subdivision is dictated by an amendment of the E-Government Act enacted at the behest
1949 of the Department of Justice. Subdivision (h), finally, provides that a party waives the protection
1950 of Rule 5.2(a) by filing its own information not under seal and without redaction.

1951 The draft Civil Rule 5.2 in the agenda book introduces variations on the most recent
1952 "template" and in some respects departs from the revisions suggested by the Bankruptcy and
1953 Criminal Rules Committees. It also raises several questions, and incorporates most of the
1954 suggestions made by the Style Subcommittee. It may be that the civil action context justifies a small
1955 number of variations from the parallel rules because of distinguishing differences from the
1956 bankruptcy and criminal contexts. But most of the questions and variations are suggestions for the
1957 best drafting of a uniform rule. They are included in the draft to facilitate comment by Civil Rules
1958 Committee members, recognizing that for the most part uniform drafting must be accomplished by
1959 other and later means. It was agreed that there was no point in pursuing these variations in detail.

1960 One difficult set of issues was noted with respect to habeas corpus proceedings. Subdivision
1961 (b), drafted in parallel with the Criminal Rule, generally exempts habeas corpus proceedings from
1962 the redaction requirements of subdivision (a). This exemption reflects the volume of unredacted
1963 records often involved in habeas corpus proceedings, and may reflect as well concerns that habeas
1964 corpus petitioners are not well positioned to redact their filings. But § 2241 habeas corpus
1965 proceedings may present special difficulties. One difficulty, unique to the Civil Rules, arises from
1966 the occasional use of § 2241 habeas corpus to raise immigration law questions. Rule 5.2(c) limits
1967 remote public access to immigration proceedings; Rule 5.2(b)(5) exempts any filing covered by Rule
1968 5.2(c) from the redaction requirement. If immigration-related § 2241 proceedings are properly
1969 treated in this way — very limited public access and no redaction — the question remains whether
1970 other § 2241 proceedings should be exempt from redaction. Section 2241 may be used to challenge
1971 detention that does not flow from a state or federal criminal conviction. The reasons for exempting
1972 other habeas corpus proceedings from redaction may not apply, and there may be stronger reasons
1973 to mandate redaction. These questions will be explored further under the direction of the
1974 Subcommittee.

1975 One general question was addressed. The Bankruptcy Rules Committee recommended the
1976 provision in Rule 5.2(e) that recognizes the court's authority to order redactions not directed by Rule
1977 5.2(a). The agenda draft suggests that this authority might better be included in subdivision (a), so
1978 that mandatory and court-ordered redaction provisions are contained in the same place. That drafting
1979 question is one that will be worked out with the Subcommittee, either before the Standing
1980 Committee meeting or during the public comment period. But the general question whether the rule
1981 should somewhere recognize authority to order additional redactions was discussed, along with the
1982 authority to limit remote public access. The Committee unanimously agreed that the rule should
1983 recognize the court's authority to order redactions not mandated by the rule, and also the authority
1984 to limit remote public access in circumstances not covered by subdivision (c).

1985 The Committee voted to recommend publication for comment, in a version to be worked
1986 through by the Subcommittee and the Standing Committee.

1987 **III AGENDA**

1988 Judge Rosenthal noted that the full agenda for this meeting — and the high level of
1989 committee activity that prepared for it — foreclosed any opportunity to undertake a general review
1990 of the many items that remain on the agenda. An agenda review is planned in advance of the fall
1991 meeting. As in earlier years, it is likely that a memorandum suggesting topics to delete from the

1992 agenda will be circulated well in advance of the meeting, so that members can consider whether
1993 some of the suggested topics should be retained or advanced on the agenda.

1994 The Standing Committee has approved a cross-Committees project to review the methods
1995 used to calculate time periods. Review of the calculation methods will entail reconsideration of
1996 many of the time periods as well. A Subcommittee chaired by Judge Kravitz will coordinate the
1997 work of the several Advisory Committees. The Administrative Office has prepared comprehensive
1998 tables of the time provisions in all of the sets of rules. The reporters will review these tables and
1999 begin to shape plans for pursuing the project. The practicing bar will be deeply grateful for any
2000 improvements that facilitate easy and assured calculation of time periods.

2001 Another project likely to come on for attention soon is a proposed Rule 48 amendment that
2002 would adopt jury polling provisions parallel to Criminal Rule 31(d). The Federal Judicial Center has
2003 already undertaken a review of civil jury trials over the last 25 years, finding that juries "hang"
2004 without returning a verdict in less than 1% of the trials. This information may assuage concerns that
2005 polling might lead to an undue number of mistrials. There may be some reason to distinguish Rule
2006 48 from the Criminal Rule, in part to adjust to the provisions in Rule 49(b) that address situations
2007 in which inconsistencies appear between a general verdict and the jury's answers to interrogatories.

2008 Several lawyers have already shown interest in another project, which would explore
2009 questions raised by expanding uses of Rule 30(b)(6) depositions.

2010 A long-standing agenda item briefly described in the materials was a proposed new Rule 62.1
2011 to address "indicative rulings" made by a district court to indicate what action it would take on a
2012 motion that it cannot decide because an appeal has transferred the case to an appellate court.

2013

Next Meeting

2014 The next Committee meeting has been set for October 27 to 28, most likely in San Francisco.
2015 The dates complement the public hearing scheduled for San Francisco on October 26. It is too early
2016 to know whether all three of the scheduled hearings will be required to meet the public interest in
2017 testifying on the Style Project. If fewer than three hearings are needed, the October 26 hearing may
2018 be canceled.

2019 Judge Rosenthal concluded the meeting by expressing the Committee's thanks and
2020 appreciation for the superb help provided by the Administrative Office staff in planning the meeting
2021 and supporting all the work that led up to it. Special thanks were extended to John Rabiej, Peter
2022 McCabe, and James Ishida. She also noted the Committee's appreciation and thanks to Myles V.
2023 Lynk for his work chairing the Discovery Subcommittee that brought to the Committee the proposals
for the e-discovery rules that are now well on the way to adoption.

Respectfully submitted,

Edward H. Cooper
Reporter