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To: **Ninth Circuit and District Courts in the Ninth Circuit**
From: **Ninth Circuit Advisory Board**
Date: **May ___, 2004**
Re: **Proposed Model Local Rule on Electronic Discovery**

The 1 definition of a "document" in Rule 34 of the Federal Rules of Civil Procedure includes reference to electronic data. As one district court put it in 1985, "[c]omputers have become so commonplace that most court battles now involve discovery of some computer-stored information." 2 However, this principle that storing information in an electronic format does not exclude it from the realm of potential discovery does not provide specific guidance on where courts and litigants should draw the lines in applying the proportionality test of Rule 26 to electronic discovery requests and disputes. In order to draw those lines, the distinctive characteristics of electronic documents in comparison to paper documents, both quantitatively and qualitatively, must be understood.

Quantitatively, electronic documents are created at much greater rates than paper documents. As a result, the amount of information available for potential discovery has exponentially increased with the introduction of electronic data. Further, the frequent obsolescence of numerous computer systems due to changing technology creates unique issues for recovering electronic documents that are not present in paper documents. Electronic documents are also more easily replicated than paper documents and are more difficult to dispose of than paper documents. This proliferation often means that neither the person who created the data nor information technology personnel will necessarily aware of the existence and locations of the replicated copies. The result is that the rate at which electronic data and documents accumulate compounds creating an entire subset of electronic data that exist unknown to the individuals with ostensible custody over them.

There are qualitative differences between electronic and paper documents as well. First, computer information, unlike paper, has dynamic content that is designed to change over time

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1 The material presented has been largely synthesized from "The Sedona Principles: Best Practices & Principles for Addressing Electronic Document Production," http://www.thesedonaconference.org/publications_html.

2 The Advisory Committee Notes for the 1970 amendments to the Federal Rules of Civil Procedure reflect the inclusive nature of the term "document":

> The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can, as a practical matter, be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and *the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs*. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of non discoverable matters, and costs. [emphasis supplied].

even without human intervention. Second, electronic data, unlike paper, may be incomprehensible when separated from their environments. In order to make sense of the data, a viewer needs the context that includes labels, columns, report formats and other information. Third, electronic documents are more changeable than paper documents. The act of merely accessing or moving electronic data can change it. Fourth, electronic documents, unlike paper, contain metadata, information used by the computer to manage and often classify the document, that is not visible to the user. Fifth, it is more difficult to determine the provenance of electronic documents than paper documents. The manner in which electronic data is created, stored and transmitted makes determination of authorship a greater challenge. Finally, while electronic documents may be stored on an individual's hard drive, it is likely that such documents may be found on high-capacity, undifferentiated backup tapes, or on network servers not under the custodianship of an individual who may have "created" the document.

Standards for dealing with electronic data and documents are therefore appropriate and indeed necessary. Federal rules already define standards for discovery. See Fed. R. Civ. P. 26(a)(1)(B) (disclosure of documents and things limited to those "in the possession, custody or control of the party and that the disclosing party may use to support its claims or defenses"); Fed. R. Civ. P. 26(b)(1) (party may obtain discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party "); Rule 26(b)(2)(i) (discovery may be limited if "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive."); Rule 26(b)(2)(iii) (limitation imposed if "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the dispute."). Local court rules likewise contain many rules or standards imposing limitations on all forms of discovery. However, these existing rules do not account for the dramatic and substantial differences between electronic and paper documents outlined above. Simply put, as a result of the qualitative and quantitative differences between electronic and paper documents, the current rules do not effectively address a myriad of issues unique to electronic documents.

Nor do the Federal Rules provide an adequate framework to address the issues that arise with electronic documents. First, the rules often impose unreasonable and unfair burdens in producing electronic documents in litigation. These unfair burdens have included, among other things, spending millions of dollars to process and review large volumes of electronic documents that had little likelihood of being relevant to the case; and preserving at great cost thousands of backup tapes that were subsequently not sought by the opposing party. Second, the unfair burdens would be minimized if standards were provided to parties and courts for addressing electronic document production. In the absence of standards, parties are left to guess as to what their obligations are, with the threat of discovery violations for incorrect guesses. Electronic document production standards arising out of practical experiences would bring needed predictability to litigants and guidance to courts.

Actually the Federal Rules do provide general rules which can be applied to electronic discovery. The Sedona Principles recognize this by stating that the ". . . balancing standard

embodied in Fed. R. Civ. P. 26(b)(2). . ". should be used in balancing the cost, burden, and need for electronic data and documents.

The principles that should govern the drafting and implementation of Local Rules are as follows: 3

1. Electronic data and documents are potentially discoverable under Fed. R. Civ. P. 34 or its state law equivalents, and organizations must therefore properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.

2. When balancing the cost, burden, and need for electronic data and documents, courts and parties should apply the balancing standard embodied in Fed. R. Civ. P. 26(b)(2) and its state law equivalents, which require considering the technological feasibility and realistic costs of preserving, retrieving, producing and reviewing electronic data, as well as the nature of the litigation and the amount in controversy.

3. Parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation, and seek, if possible, to reach agreement concerning the scope of each party s rights and responsibilities.

4. Discovery requests should make as clear as possible what electronic documents and data are being asked for, while responses and objections to discovery should disclose the scope and limits of what is being produced.

5. The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to. take every conceivable step to preserve all potentially relevant data.

6. Responding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronic data and documents.

7. When the responding party has shown that it has acted reasonably to preserve and produce relevant electronic data and documents, the burden should be on the requesting party to show that additional efforts are warranted under the circumstances of the case.

8. The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval, and resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review or produce deleted, shadowed, fragmented or residual data or documents.

10. A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.

11. A responding party may properly access and identify potentially responsive electronic data and documents by using reasonable selection criteria, such as search terms or samples..

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3 "Sedona Principles for Electronic Discovery."

12. Absent specific objection, agreement of the parties or order of the court, electronic documents normally include the information intentionally entered and saved by a computer user.

13. Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.

14. Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, it is found that there was an intentional or reckless failure to preserve and produce relevant electronic data, and a showing of a reasonable probability that the loss of the evidence materially prejudiced the adverse party.

Proposed Local Rules governing discovery of electronic data and documents

Rule 1: (A) Duty to Investigate. No later that 21 days prior to a Fed.R.Civ.P. 26(f) scheduling conference, counsel should carefully investigate their client's information management system so that they are knowledgeable as to its operation, including the types of information stored, how information is stored and how stored information can be retrieved. Likewise, counsel shall reasonably review the client's computer files to ascertain the contents thereof, including archival and legacy data (outdated formats or media), and disclose in the Initial Disclosures under Fed.R.Civ.P. 26(a)(1) the computer based evidence which may be used to support claims or defenses.

(B) Duty to Notify. A party seeking discovery of computer-based information shall notify the opposing party immediately, but no later than 21 days before the Fed.R.Civ.P. 26(f) scheduling conference, of that fact and identify as clearly as possible the categories of information which may be sought.

(C) Duty to Meet and Confer. At the conference of the parties held pursuant to F.R.Civ.P. 26(f) the parties shall exchange information on the types of electronic data and documents each maintains; disclose the scope of electronic data and documents to be sought in discovery; and discuss the appropriate and reasonable steps that each party should take to preserve electronic data and documents that is reasonably anticipated to be relevant to litigation. In addition, the parties shall specifically address the following specific matters:

(i) Computer-based information (in general). Counsel shall attempt to agree on steps the parties will take to segregate and preserve computer-based information in order to avoid accusations of spoliation;

(ii) E-mail information. Counsel shall attempt to agree as to the scope of e-mail discovery and attempt to agree upon an e-mail search protocol. This should include an agreement regarding inadvertent production of privileged messages.

(iii) Deleted information. Counsel shall disclose in detail all relevant document retention and destruction policies particularly as they pertain to electronic documents and information; shall identify electronic documents or information deleted or destroyed within the 60 day period prior to filing of the complaint; shall confer and attempt to agree on whether or

not restoration of deleted information (whether or not deleted or destroyed within the 60 days prior to filing of the complaint) may be necessary; and, to the extent that restoration of deleted information is needed, who will bear the costs of restoration; and

(iv) Back-up data. Counsel shall attempt to agree whether or not back-up data may be necessary, the extent to which backup data is needed and who will bear the cost of obtaining back-up data.

The parties shall submit, as part of the written report outlining the discovery plan required pursuant to Fed.R.Civ.P. 26(f), a proposed plan relating to discovery of electronic data addressing in detail the topics identified in this paragraph.

(D) The parties should make every effort to reach agreement on the scope of electronic data and documents to be preserved considering the cost, burden, need for the discovery and the likelihood that the electronic data and documents will contain relevant information.

Rule 2: The obligation to search for electronic data and documents shall be limited to a search of active data that admits of efficient searching and retrieval. The preservation or searching of non-active data and information such as disaster recovery backup tapes; deleted, shadowed, fragmented or residual data or documents; or any source other than active information shall not be required absent an order of the court upon motion by the requesting party demonstrating a need for the such preservation or searching, the likelihood that relevant information not available from other sources will be found in such media, and that the relevance of such information and data outweighs the cost, burden, and disruption of retrieving and processing the data from such sources.

Rule 3: Electronic documents shall be produced in electronic form (including metadata) absent specific objection, agreement of the parties, or order of the court.

Rule 4: Each request for electronic data or documents shall identify the type of data or document sought with sufficient detail to enable the responding party to conduct an electronic search of its electronic data and documents. The responding party may access and identify potentially responsive electronic data and documents using reasonable selection criteria, such as search terms or samples. Each response to a discovery request that includes data and documents recovered by such an electronic search shall include a statement identifying the electronic media searched; the selection criteria; the methodology incorporated; and the technologies (including the identity of software) utilized.

Rule 5: Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic data and documents from active data files shall be borne by the responding party. Absent special circumstances, the costs of retrieving and reviewing electronic data and documents from non-active sources shall be borne by the requesting party.