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Keynote Address: E-Discovery beyond the Federal Rules

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E-DISCOVERY BEYOND THE FEDERAL RULES

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Those who work on the Federal Rules of Civil Procedure (Federal Rules) are sometimes tempted to think that the world revolves around them. With e-discovery, that temptation has been particularly strong because the federal rulemakers began addressing it before most others did, and because the amendments to the Federal Rules have received a great deal of attention. As one who spent about a decade considering those issues,[1] I am peculiarly tempted to this sort of self-absorption.

Now, the federal rulemaking process is over, and it is time to reflect on the other forces that will affect e-discovery in the future, in particular the other sources of rules that may govern this form of discovery. This symposium is an occasion for that sort of evaluation, particularly important here because Maryland has leading examples of two other sources of direction on e-discovery—district court guidance and state court rulemaking—that will be addressed by those experienced with those activities.

I intend to set the scene for that evaluation in four steps. First, I will stress the broad impact of e-discovery. Second, I will indulge in a bit of a travelogue to chronicle and summarize the federal rulemaking experience, because that experience should be a useful touchstone for others considering similar efforts. Third, I will identify three sources of e-discovery regulation or guidance from beyond the Federal Rules. And fourth, I will reflect on the perennial rulemaking question—are rules better? I will then offer some concluding thoughts.

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1. Since 1996, I have been the Special Reporter of the Advisory Committee on Civil Rules, working largely on discovery matters. In my speech and this Essay, however, I speak only for myself and not for any organization or other person.

I. THE BROAD IMPACT OF E-DISCOVERY

It is hard to miss e-discovery nowadays. Indeed, the use of evidence from electronically stored information has emerged in the international sphere. Recently, for example, armed forces from Colombia killed a rebel leader just inside Ecuador and captured his laptops, supposedly yielding information about support the rebels were receiving from the government of Venezuela, and Colombia said it might file charges against Venezuelan President Hugo Chavez in the International Criminal Court.[2] That episode is not, of course, what we would usually think of as e-discovery, but it hints at the potential importance of forensic use of electronically stored information.

Focusing more closely on our topic today, we must recognize how riveting it has become in American litigation. As Judge (now Dean) John Carroll has said: "[E]lectronic discovery is the hottest topic in civil litigation. Articles on the issue routinely run in the *Wall Street Journal* and *New York Times*, and there are more seminars . . . on the topic than kudzu in Alabama."[3] Judge Carroll comes from Alabama, so he knows whereof he speaks regarding kudzu.

I cannot identify all impacts of e-discovery today, but believe we should focus particularly on three:

A. Corporate America

As I will mention later, corporate America did not initially seem to appreciate the importance of e-discovery. It is not likely that Microsoft Corporation foresaw the uses to which internal email messages could be put in *U.S. v. Microsoft*, the first occasion when such evidence got a lot of attention. More recently, however, corporate America has awakened to e-discovery in its many guises. Rather than taking Deep Throat's recommendation to "follow the money," the modern investigator may be better advised to "follow the email trail." In short, for most organizations, it is not too far from the truth to say that *everything* is in electronically stored information; it could be viewed as the "corporate equivalent of DNA."[4] And that

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2. *See* Alexei Barrionuevo, *U.S. Studies Rebels' Data for Chávez Link*, N.Y. TIMES, Mar. 14, 2008, at A8.
3. John L. Carroll, *E-Discovery: A Case Study in Rulemaking by State and Federal Courts*, *in* THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS 45, 46 (Pound Civil Justice Inst. ed., 2005) [hereinafter THE CHALLENGE OF RULEMAKING].
4. Nicholas Varchaver, *The Perils of E-mail*, FORTUNE, Feb. 17, 2003, at 96.

"everything" would likely include a lot more loose banter than previously would have been written down.

Corporate America has reacted to this new situation. One reaction is to urge employees to be more circumspect in what they write in email. Some employers reportedly have tried formally to school their employees in how to use email. In the same vein, law schools have begun offering courses in use of email.[5]

Retraining and self-control are probably not by themselves sufficient. Attention has therefore turned also to document retention. This can be serious business. Consider, for example, the recent report that Morgan Stanley agreed to pay "$12.5 million to resolve charges that it failed to produce e-mail in arbitration cases and falsely stated that the messages were lost in the Sept[ember] 11[th] . . . attacks."[6] The September 11th attacks did indeed destroy the firm's servers, but many of the emails had been saved on other servers or on employees' individual computers. So they could still be found.

Given these concerns, it is not surprising that the market has responded. One response is the self-destructing email message. Some of us remember a TV show called *Mission Impossible*, which began each episode with the chief protagonist receiving instructions on his next assignment on a tape that promptly self-destructed. The *Wall Street Journal* reported in mid-2006 that new services are available that permit the sender of an email message to arrange that it will self-destruct after the passage of a pre-set time.[7] It is called Kablooey Mail. A 2007 article in the *National Law Journal* reported that insurers have begun to focus on email in setting premiums for their errors and omissions policies. According to the author—who identifies himself as head of his law firm's "e-discovery practice group"—"businesses seeking liability insurance will face questions from their insurers regarding the robustness of the company's document-retention and e-mail-retention policies and procedures; [and] the existence, or lack, of an electronic discovery readiness plan . . . ."[8]

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5. *See* Eron Ben-Yehuda, *Sending Unwise E-Mails Can Be Hazardous to Your Career*, S.F. DAILY J., Oct. 11, 2004, at 4; *see also* Richard L. Marcus, *E-Discovery & Beyond: Toward* Brave New World *or* 1984*?*, 25 REV. LITIG. 633, 644 (2006).
6. Reuters, *Wall St. Firm Settles Case on Handling of E-Mail*, N.Y. TIMES, Sept. 28, 2007, at C5.
7. *See* Andrew LaVallee, *This Email Will Self-Destruct*, WALL ST. J., Aug. 31, 2006, at D1.
8. Edwin M. Larkin, *Insurers Are Getting in on the Act*, NAT'L L.J., Aug. 20, 2007, at 51.

Besides preparation for e-discovery, companies also use email as a mode of monitoring what their employees do. In 2001, it was reported that about three-quarters of U.S. companies monitored employee use of the Internet and spied on employee email.[9] "Snoop" software has been developed to assist companies in doing this surveillance.[10] Thus, it may be that failure to monitor employee activities could itself expose a company to liability for workplace harassment and similar claims; at least it seems that companies are regularly using electronically stored information to detect it.

In sum, by now, e-discovery has become a very big deal for corporate America.

B. Law Firms

Whatever becomes a big deal for corporate America is likely to become a big deal for many law firms also. E-discovery surely has become a big deal for law firms.

To begin with, a number of law firms have created e-discovery departments. Thus, the author of the article about insurers' attention to e-discovery identifies himself as the head of his firm's e-discovery department. It may be that this is necessary as a matter of self-preservation for firms. According to one vendor, "[w]e have already observed . . . many companies changing counsel because of the lack of expertise of certain law firms regarding electronic discovery."[11]

This self-preservation may go beyond keeping clients; malpractice concerns loom in the background. According to two lawyers writing in the *National Law Journal* in December 2007, "[i]n the context of electronically stored discovery, the skills and legal knowledge that might be deemed an essential part of 'competency' are rapidly changing with technological advances," and as a result it is "highly probable that malpractice claims will largely center on counsel's competency in advising clients as to preservation and production of e-discovery."[12]

E-discovery may further affect the organization of law firms. The Chicago-based firm McDermott, Will & Emery, for example,

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9. Kevin Livingston, *Battle over Big Brother*, S.F. RECORDER, Aug. 30, 2001, at 1.
10. John Schwartz, *Snoop Software Is Generating Privacy Concerns*, N.Y. TIMES, Oct. 10, 2003, at C1.
11. Michael R. Arkfeld, *Growing Pains for the Amended Federal Rules*, *in* AM. LAW (SPECIAL ADVERTISING SECTION; TRIAL TACTICS & TECHNOLOGY; THE NEW HORIZONS OF E-DISCOVERY) (2007) (on file with author).
12. Janet H. Kwuon & Karen Wan, *High Stakes for Missteps in EDD*, N.J. L.J., Dec. 31, 2007.

reportedly plans to create a new tier of attorneys—perhaps to be called permanent contract associates. Part of the explanation is that regular associates have become very expensive, and "electronic discovery has dramatically increased the amount of basic work that usually goes to those high-priced associates."[13] E-discovery, then, may be an important stimulus in creating this new variety of associate. And for all associates, it may transform document review. Formerly occupied by review of hard copies in client quarters, perhaps in remote locations, it may now instead involve days or weeks before computer screens. Whether this is an improvement could be debated.

Law firms may also be more inclined to consider outsourcing because of e-discovery. A January 2008 article in the *San Francisco Recorder* reported, for example, that "[h]igh rates and the increasing bulk of e-discovery have pushed the associate general counsel of San Francisco-based Del Monte Foods to seriously consider using sources outside his outside law firm for the grunt work of litigation."[14] In February 2008, another article reported that the Washington-based law firm Howrey was opening an office in India that "will handle document management in litigation."[15]

Even where they retain their traditional clients' work in-house, law firms may find their role changing. As noted again below, the challenges and stresses of e-discovery seem to be putting an unprecedented premium on outside counsel's familiarity with their clients' information-management arrangements and capabilities.[16]

Thus, at bottom, e-discovery could have a broad effect on law firms, possibly creating new practice groups (or even what one would describe as new practices), presenting a new breed of malpractice claims, rearranging the internal hierarchy of the firm, and leading to outsourcing in various manners. Yet at the same time, it seems that many lawyers are far behind the curve on e-discovery issues. A February 2008 article in the *National Law Journal*, for example,

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13. Kellie Schmitt, *McDermott Plans to Fill Cheap Seats*, S.F. RECORDER, Nov. 1, 2007, at 1.
14. Zusha Elinson, *GCs Embracing Outsourced Work*, S.F. RECORDER, Jan. 24, 2008, at 1; see also Aruna Viswanatha, *Inside Out: Working the Split Shift at an Indian Legal Outsourcing Company*, AM. LAW., Mar. 2008, at 20 (reporting that the estimated number of people working at legal outsourcing firms in India tripled from 1,800 to almost 6,000 lawyers between March 2005, and the end of 2006, and that document review projects done by these firms are typically billed at $15 to $25 per hour).
15. Daphne Eviatar, *Howrey Opens India Office for Document Management*, S.F. RECORDER, Feb. 11, 2008, at 3.
16. *See infra* Part V.

reports that "lawyers specializing in legal technology[ ] report they still encounter large numbers of lawyers who ask: 'What in the world is metadata and why should we be worried?'"[17] The article recounts the debate about whether it is proper for lawyers to search for metadata in files received from other counsel and the divergence in advice from state ethics authorities on this subject. One point worth noting is that this debate underscores the potential malpractice issues mentioned above.

C. The Vendor Phenomenon

Lawyers like to think of themselves as independent actors; they may hire outsiders—such as expert witnesses or consultants—to assist them in doing their professional jobs, but ultimately they are free-standing professionals providing advice and representation to the client.

With e-discovery, the advent of departments devoted to that activity may foster a continuing sense of independence, but the growing importance of e-discovery vendors calls it into question. Almost unknown just a few years ago, e-discovery vendors have become a very big deal. One forecast is that their revenues during 2009—next year—will top $4 billion.[18] For lawyers, deciding whether to hire a vendor, and selecting a vendor, may involve important new professional skills.

Making a poor choice of vendor can certainly cause headaches for lawyers. In January 2008, for example, it was reported that the New York law firm Sullivan & Cromwell had sued an e-discovery vendor in federal court in New York for "untimely and inaccurate" work that allegedly hindered the firm's staffing arrangements and caused it to expend extra resources on discovery. The law firm asked the court to rule that it should not have to pay $710,000 in outstanding billing from the vendor.[19] The vendor promptly filed a countersuit in a Washington state court to compel payment of the bills, and the parties shortly thereafter announced a confidential settlement.[20] Also in January 2008, the Los Angeles law firm O'Melveny & Myers apologized for a discovery "mishap" in which more than 700,000

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17. Marcia Coyle, *"Metadata" Mining Vexes Lawyers, Bars*, NAT'L L.J., Feb. 18, 2008, at 1.
18. *See* GEORGE SOCHA & THOMAS GELBMANN, EDD SHOWCASE: EDD HITS $2 BILLION 1 (2007), http://www.sochaconsulting.com/2007_Socha-Gelbmann_ED_Survey_Public_Report.pdf.
19. *See Sullivan Sues Over E-Discovery Problems*, S.F. RECORDER, Jan. 8, 2008, at 14.
20. *See Law Firm, E-Discovery Vendor Settle Suits*, S.F. RECORDER, Jan. 18, 2008, at 9.

emails were not turned over in discovery, blaming an "outside vendor" in a court filing about the discovery issue.[21] Getting it right in hiring a vendor can be a high-stakes business.

This is not an entirely comfortable position for law firms to be in; as explained in a recent article in the *California Lawyer*:

> E-discovery has brought about a kind of role reversal in the legal profession: Now it's the lawyers who find themselves surrounded by circling sharks. Once an e-discovery vendor identifies an attorney or law firm as a potential client, there's often no end to the sales pitches, product demos, complimentary mouse pads, and follow-up emails from perky PR reps.[22]

Although one may find it a little difficult to worry about the plight of Sullivan & Cromwell and O'Melveny & Myers as they attempt to deal with these "sharks," the notion that even they might fall victim to overconfident vendors is unnerving to the rest of us.

At the same time, there can be uncertainty about whether there is really any need for a vendor at all. A continuing marketing theme from vendors is the riskiness for lawyers of "[t]rying to go it alone."[23] In a sense, that's the same sort of thing lawyers tell potential clients—you need a lawyer to protect yourself and should not try to proceed without one. Now, perhaps, the shoe is on the other foot.

But do lawyers always need to put on that shoe? An October 2007 article in the *California Lawyer* suggests that they need not: "[E]ven some e-discovery consultants caution against the overuse of outside experts. Except in complex cases, 'a paralegal who has been sent to a workshop and trained on a piece of software can probably handle e-iscovery,' contends [an e-discovery vendor who sells such software]."[24] But another article in the same issue seems to point the other way: "Most comprehensive e-discovery setups must be customized for each case, and this is usually a job for the e-discovery installers or third-party consultants."[25]

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21. *See* Dan Levine, *O'Melveny Says It's Sorry for Missing E-Mails*, S.F. RECORDER, Jan. 23, 2008, at 1.
22. Tom McNichol, *The E-Vendors Cometh*, CAL. LAW., Feb. 2008, at 37.
23. *See* Julie Noble, *Dangers in E-Discovery*, LEGAL TIMES, June 3, 2002, at 15 (identifying "trying to go it alone" as the most common mistake in regard to e-discovery).
24. Eamon Kircher-Allen, *Electronic Expertise*, CAL. LAW., Oct. 2007, at 9.
25. Sandra Rosenzweig, *Up to Speed on E-Discovery*, CAL. LAW., Oct. 2007, at 28.

Lawyers contemplating these choices do so under a possible malpractice sword of Damocles. In the words of the already-quoted malpractice fearmongers:

> Whether the use of e-discovery vendors can dispel e-competency obligations remains to be seen. Moreover, it is unclear to what extent e-discovery can be considered a specialized substantive expertise in the same vein as, for example, patent law or whether it is more akin to a learnable skill such as taking depositions . . . .[26]

Frankly, conceiving of e-discovery skills as akin to patent law seems implausible to this observer. Nonetheless, the question whether retaining a vendor will protect the lawyer underscores the potential for risk in the process right now. Failing to retain a vendor presumably means that the lawyer is entirely exposed to charges that one should have been hired. Having a paralegal do the job instead could look problematical if something goes wrong.

In sum, the vendor possibility underscores and complicates the challenges of e-discovery for lawyers.

II. THE FEDERAL RULES EXPERIENCE AND THE AMENDMENTS' ORIENTATION

This is the travelogue portion of our program, for I spent a considerable portion of the last decade addressing the issues raised by e-discovery in service to possible amendments to the Federal Rules of Civil Procedure dealing with them. It is worth recalling that this is only a decade's experience and yet it covers virtually the entirety of the history of e-discovery.

As background, it is important to remember that the phenomenon of broad discovery is itself a relatively recent development in American litigation. As Professor Subrin showed a decade ago, the adoption of broad discovery in the original Federal Rules in the 1930s represented a revolution and created a regime never before seen anywhere.[27] And the initial version of those rules was relaxed further so that, by 1970, the era of broad discovery had reached its zenith. Most states followed the federal lead, either by adopting rules mirroring the federal provisions or expanding discovery under their own rules. But from the perspective of the rest of the world, where

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26. Kwuon & Wan, *supra* note 12, at E2.

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

party-controlled discovery was an unknown thing, this produced a different reaction. As Professor Subrin has also written, it might be summed up with three words: "Are We Nuts?"[28]

In the U.S., a reaction began in the 1970s. In part, this reaction was fueled by developments in substantive law. After the 1930s, American substantive law evolved rapidly in ways that magnified the opportunity to seek relief in court. The first private federal securities fraud suit, for example, was in 1947. In the 1950s and 1960s, products liability law relaxed and expanded. Congress and state legislatures adopted many measures that permitted private suits—sometimes for statutory damages—on a variety of grounds. These substantive changes magnified the importance of broad discovery. So did technological developments. The introduction of the photocopier in the 1950s and 1960s meant that there was a great deal more to discover.

However one interprets the cause for the reaction, there is no question that there was a reaction in the U.S. starting a third of a century ago.[29] In terms of rule amendments, the basic orientation was to contain and constrain discovery rather than to abandon the basic commitment to pretrial access to important information. In 1983, this effort produced the proportionality provisions now in Rule 26(b)(2)(C). It also prompted the expansion of judicial management embodied in amendments that year to Rules 16(b) and (c). In addition, it produced the 1983 amendments to Rule 11 and the addition of Rule 26(g). Together, these changes not only required that lawyers sign filings in court and discovery papers, but also provided that they thereby certified the legitimacy of the litigation maneuvers in those papers. In 1993, further amendments fortified this containment effort—the meet-and-confer requirement of Rule 26(f), the discovery moratorium under Rule 26(d) until that conference occurs, and the disclosure requirements of Rule 26(a), which were designed to obviate discovery requests for certain basic information.

Despite these efforts, concern about discovery problems endured. That concern led to the Discovery Project of the Advisory Committee on Civil Rules, inaugurated in 1996. That project was, in a sense, born in Baltimore—it began as Judge Paul Niemeyer of the Fourth Circuit assumed the post of Chair of that Advisory Committee. I was

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28. *See* Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

29. This reaction is chronicled in Richard Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998).

given the opportunity to act as Special Reporter on this project. Although one could head for the law library to try to develop ideas for further discovery reforms, the more important thing to do was to obtain input from the practicing bar about what issues really warranted attention.

So the Advisory Committee convened several conferences of experienced lawyers to solicit ideas and feedback about possible rule amendments. The great majority of what those lawyers said dealt with matters that were expected. Besides specifics about individual possible rule changes, the overarching theme was that lawyers needed "adult supervision" from judges in the discovery arena.

But there was one big new thing that emerged from those conferences—e-discovery.[30] From the outset of this process of interacting with the bar that began in early 1997, the Committee was told that it was fighting the last war. "The real discovery issue is email," many said. When the package of discovery amendments that emerged from the Discovery Project did not include any specifically keyed to e-discovery, the absence of such provisions produced unhappiness in some circles. A prominent Philadelphia lawyer, for example, came to the December 1998 hearing on those proposed amendments here in Baltimore and urged rulemaking to deal with e-discovery issues.

Dealing with e-discovery issues in the rules presented problems, however. These issues were new, and devising appropriate reactions was a major challenge. Some ideas suggested then may seem quite curious from today's perspective. A number of people, for example, said that the right approach would be to declare somehow that email is not discoverable. Given the prominence of email in litigation of many types, one can appreciate how dramatic such a measure would be. Although they spoke vigorously of the problems that e-discovery presented, lawyers had few specific ideas about what to do to solve them. One thing was relatively clear, however—technological change was rapid, and e-discovery was a moving target. Coupled with the unfamiliarity of the terrain, this moving-target problem played a significant role in explaining the absence of e-discovery provisions in the package of amendments that went into effect in 2000.

Once that amendment package was completed, however, attention to e-discovery returned to the fore. In January 2000, the Chair of the

30. For a chronicle of this activity of the Advisory Committee, see Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004).

Advisory Committee and I attended the American Bar Association Section of Litigation leadership meeting and held an open-mic session with lawyers there about e-discovery. In addition, we were buttonholed during the event by lawyers concerned about these issues. Without overstating, it seems fair to say of these leaders of the bar that they probably had many prominent corporations among their clients. Assuming that's correct, the recurrent messages they offered were significant in at least two ways.

First, several said something like, "Amend the rules to make it clear that email and other computer information are subject to discovery." The explanation for this desire? "I can't get my clients to take this discovery seriously." Compare the current impact of e-discovery on corporate America,[31] and one can appreciate that there has been a major shift in reported corporate attitudes.

Second, many said, "Tell us exactly what to do." This sort of request often focused on preservation or form of production issues. The theme was that if the Advisory Committee would prescribe a precise protocol for handling e-discovery—perhaps even endorsing some specific computer program for dealing with it—it would provide the sort of assistance the lawyers were seeking. But a moment's reflection will demonstrate that such a course of action would not work. Computer programs to deal with e-discovery are commercial products, and the Committee could hardly endorse one of them, even if it were technologically knowledgeable enough to make a choice. And these products were continuously changing. Rule changes take years to accomplish, so even if one could make a choice in 2000 there would be no reason to think that it would still be the right choice by the time the rule changes went into effect, much less for years after that.

Throughout 2000, further study of e-discovery ensued. This effort culminated in a mini-conference in October 2000, that considered a package of possible areas for rule changes which corresponds significantly with those ultimately adopted in 2006—amending Rule 26(f) to call for early discussion of e-discovery issues, excusing responding parties from producing inaccessible electronically stored information unless ordered to do so by the court, addressing form of production, dealing with preservation of electronically stored information, considering allocation of costs of e-discovery, and

31. *See supra* Part I.A.

responding to the problems presented by privilege waiver.[32] The reaction of the participants in this mini-conference was that the problems presented by e-discovery were not so acute as to warrant rulemaking right at the time, and that the particular rulemaking ideas that had emerged did not necessarily seem promising. The bottom line: Back off.

The Advisory Committee backed off for a couple more years. In September 2002, it wrote to about 250 carefully-selected lawyers nationwide seeking reactions on whether rulemaking for e-discovery would be a good idea.[33] The letter outlined the Committee's work on the subject so far and possible areas for rulemaking. It asked recipients to respond with their reactions. It also invited them to pass along the request to anyone else they knew who might have views on the subject. The 250 lawyers had been selected because they had been involved in CLE programs about e-discovery or otherwise were connected with these issues.

The response was not overwhelming. Although many responses were very thoughtful and helpful, there were only about a dozen of them. The Committee nonetheless began serious evaluation of e-discovery amendments in 2003, leading to a preliminary draft of proposed amendments published in August 2004. That package included features that eventually went into effect on December 1, 2006—amending Rule 26(f) to call for early discussion of e-discovery, particularly form of production, and of preservation of all sorts of discoverable material, amending Rule 34(b) to address form of production, amending Rule 26(b) to deal with problems of accessibility, amending Rule 37 to limit sanctions for loss of electronically stored information, and amending Rule 26(b)(5) to provide a protocol for handling situations in which assertedly privileged information had been produced.

The publication of the preliminary draft provoked intense interest. More than 250 written comments came in on the draft, and so many people signed up to testify about them that an extra day of hearings in Washington, D.C. had to be added to accommodate them all.[34] After

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32. *See* Memorandum from Rick Marcus, Special Reporter, Advisory Comm. on Civil Rules, to Participants in Oct. 27, 2000 Conference on Computer-Based Discovery at Brooklyn Law School (Oct. 4, 2000) (on file with author).

33. *See* Letter from Richard L. Marcus, Special Consultant, Discovery Subcommittee, to E-Discovery Enthusiasts (Sept., 2002) (on file with author).

34. Transcripts of the hearings and a summary of the comments are on file with the Administrative Office of the United States Courts, http://www.uscourts.gov/rules/index.html.

the comment period, significant refinements were made in several of the rule amendments, and they went forward. The federal rulemaking initiative was finished, at least for this phase.

III. BEYOND THE FEDERAL RULES

Although the Federal Rules may be the most important set of rules, they are not the only ones. Lawyers and litigants need to pay attention to other sources, and those sources could produce markedly different treatments of these issues. For present purposes, it seems valuable to note three sources—state court rules, federal local rules, and international regulations.

A. E-Discovery in the State Courts

Some might think that e-discovery is the exclusive (or at least main) preserve of the federal courts. Those courts have many of the high-value, prominent lawsuits, and are centered in the larger cities. Yet if one reflects for a moment, one will realize that most litigation is in the state courts. And because most Americans by now utilize email and rely on computers for a variety of other activities, e-discovery would seem equally likely in state court litigation. Moreover, even the federal court experience suggests that e-discovery is not solely a big-city phenomenon. The first federal district courts to have local rules focused on e-discovery were in Arkansas and Wyoming, not New York or San Francisco.

The likelihood that state courts would experience e-discovery can be gleaned from popular culture. Consider a recent *New Yorker* cartoon showing a man seated at a desk looking quizzically about the contents of the desk drawer to a standing woman who says to him: "Oh that—that's the hard drive from my first marriage." Such a hard drive could be plumbed through e-discovery in a divorce case. Similarly, consider a recent headline in the *Oakland Tribune*: "Lawyers Dig into FasTrak Data."[35] FasTrak is the computerized method of paying tolls for bridge crossings in the San Francisco Bay Area, and lawyers have found that it offers a dandy way of showing where opposing parties were. Thus, one can prove that the wandering husband was actually in Marin County with his squeeze rather than being (as he claimed to his wife) hard at work at the office in the city.

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35. John Simerman, *Lawyers Dig into FasTrak Data*, OAKLAND TRIBUNE, June 5, 2007, at 1.

Actually, Texas got a jump on the federal rulemakers in devising rules designed specifically for e-discovery; in 1996, it adopted a provision to regulate that form of discovery.[36] Justice Nathan Hecht of the Texas Supreme Court, who played a role in the drafting of the Texas provision, was a member of the Advisory Committee on Civil Rules when it considered federal e-discovery provisions. And the report then from Texas was that there were no cases interpreting the Texas provision, perhaps proof of its success.

However one interprets the Texas experience, it seems unavoidable that state courts will encounter e-discovery with growing frequency. Without meaning to be limiting, I suggest that there are many types of cases in which such discovery is likely:

Commercial disputes: Commercial disputes can readily be in state court, either because they do not satisfy federal court jurisdictional requirements or because the parties would prefer state court. Almost all commercial enterprises nowadays rely primarily or entirely on computers to store and generate the information on which they rely in their everyday operations. Just as in federal court, those cases will involve e-discovery.

Marital litigation: As the cartoon and newspaper article mentioned above suggest, marital litigation is likely to involve e-discovery. It seems that this likelihood is becoming reality. Thus, a September 2007 article in the *New York Times* offered the following report about divorce cases: "'In just about every case now, to some extent, there is some electronic evidence,' said Gaetano Ferro, president of the American Academy of Matrimonial Lawyers, who also runs seminars on gathering electronic evidence. 'It has completely changed our field.'"[37] A New York state court divorce case, for example, involved what the court described as a "preemptive strike [by the wife] to clone the computer records" of the husband based on claims that he had in the past diverted marital assets.[38] In another New York state court case, the wife simply took the husband's laptop to obtain access to information on his finances.[39] Similarly, in a Connecticut case, a court ordered a wife's laptop seized.[40]

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36. *See* TEX. R. CIV. P. 196.4.
37. Brad Stone, *Tell-All PCs and Phones Transforming Divorce*, N.Y. TIMES, Sept. 15, 2007, at A1.
38. Etzion v. Etzion, 796 N.Y.S.2d 844 (N.Y. Sup. Ct. 2005).
39. Byrne v. Byrne, 650 N.Y.S.2d 499 (N.Y. Sup. Ct. 1996).
40. *See* Thomas B. Scheffey, *Locking Down a Laptop*, NAT'L L.J., Mar. 29, 2004, at 4.

By definition, divorce litigation is state court litigation.[41] State courts dealing with it will need to deal as well with e-discovery.

Personal injury litigation: Another staple of state court litigation is personal injury litigation. A bit of reflection suggests the possible importance of email and other electronic communications in such suits. For example, suppose the plaintiff, the day after the accident, sent an email message to his mother about his injuries. What would he be likely to say? Often, something like, "Don't worry, Mom. I really wasn't hurt at all." If plaintiff later sues claiming serious injuries, wouldn't the defense want to use this message as evidence?

This sort of situation probably presents serious preservation issues. Will the plaintiff delete the email message to his mother? Will the defendant be able to require the plaintiff to make considerable efforts to retrieve it? For the present, it is not clear whether such issues are being litigated, but the potential seems impossible to overlook.

It is not certain whether that sort of discovery has frequently occurred yet, but there is at least one appellate court case involving a remarkable dispute about access to a plaintiff's home hard drive in a personal injury case.[42] Plaintiff received serious head injuries in a collision with defendant's truck and claimed that the injuries prevented him from continuing to work. Plaintiff submitted expert testimony that he had suffered traumatic brain injury, significantly impairing his work and social capabilities. Witnesses called by plaintiff testified that he had difficulties with memory, planning, and controlling his temper, that he missed meetings, was confused, and could no longer make critical decisions. Defendant obtained production of plaintiff's home computers and was able to show that somebody had accessed unallocated space on the laptop and "scrubbed" it using a "WipeInfo" program. Defendant's expert also found child pornography on the computer.[43]

Defendant argued that plaintiff had "wiped" much of the offending child pornography from the computer, that his ability to do so contradicted his claims that he could not perform difficult tasks, that the presence of child pornography provided an explanation for his social difficulties unrelated to the accident, and that the spoliation of the hard drive of the laptop justified dismissal of plaintiff's case. The trial court refused to dismiss, but did give an adverse inference

41. *See* Ankenbrandt v. Richards, 504 U.S. 689 (1992) (upholding "domestic relations exception" to diversity litigation to exclude from federal court all cases involving divorce, alimony, or child custody disputes).

42. Foust v. McFarland, 698 N.W.2d 24 (Minn. Ct. App. 2005).

43. *Id.* at 27–29.

instruction. The jury nonetheless returned a verdict for more than $11.3 million, and defendant appealed, urging the appellate court that the case should have been dismissed. The appellate court affirmed, finding the likely relevance of the lost evidence small and the adverse inference instruction sufficient.[44]

Certainly one could debate the relevance of the lost evidence in this case, particularly when compared to the high risk of unfair prejudice resulting from knowledge of the child pornography. Indeed, one could question the showing needed to justify such discovery in the first place. But the case emphasizes the potential for discovery from plaintiffs in personal injury cases.

Discrimination litigation: In a variety of contexts, American courts see discrimination claims. Often email communications lie at the heart of such cases.

Theft of trade secrets: Particularly in high-tech enterprises, there are often claims that former employees have stolen trade secrets. When their employers sue former employees, the employers frequently seek discovery of their computers to show that the former employees took the employer's proprietary information with them. There are several state court examples of such discovery disputes.[45]

The state courts outside Texas have certainly not been blind to the prospect of such discovery. To the contrary, both the Conference of Chief Justices and the National Commissioners on Uniform State Laws have drafted and promulgated models for states to follow in adopting rules for e-discovery. There are varying counts on how many states have moved toward adoption.[46] We are told that "[l]awyers accept state electronic discovery rules as inevitable and potentially helpful for clarifying thorny issues."[47] Even my home

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44. *Id.* at 28–29, 34.

45. *See, e.g.*, Autonation, Inc. v. Hatfield, No. 05-02037 2006 WL 60547 (Fla. Cir. Ct. Jan. 4, 2006) (court issuing injunction requiring return to plaintiff of all computer disks with plaintiff's information); Elec. Funds Solutions v. Murphy, 36 Cal. Rptr. 3d 663 (Cal. Ct. App. 2005) (defendants accused of converting plaintiff's assets while working for plaintiff); Hildreth Mfg., L.L.C. v. Semco, Inc., 785 N.E.2d 774 (Ohio Ct. App. 2003) (claimed breach of agreement regarding formation of competitor of plaintiff); Dodge, Warren & Peters Ins. Serv., Inc. v. Riley, 130 Cal. Rptr. 2d 385 (Cal. Ct. App. 2003) (former employee of plaintiff allegedly took electronic trade secret information).

46. Sheri Qualters, *States Launching E-Discovery Rules*, NAT'L L.J., Oct. 8, 2007, at 1. (describing move by many states to adopt e-discovery rules).

47. *Id.*

state of California, after hesitating about doing so, has moved forward on proposed rules and statutes for e-discovery.[48]

So one place to look beyond the Federal Rules is in state court rules. As a generalization, it is comforting to those in the federal rulemaking effort to be able to report that many of these state court rules appear to resemble, and perhaps to emulate, the Federal Rules amendments that went into effect in 2006. To some extent, this experience may show that the federal rulemakers can still be leaders for the state courts.[49] In any event, it does show that those dealing with e-discovery must look beyond the Federal Rules.

B. Federal Local Rules

The national rulemakers have what might be called a love-hate relationship with local rules. On one hand, at least some national rulemakers have been heard to suggest that there should be an absolute numerical limit on local rules, although counting them might prove challenging. In the 1980s, there was a Local Rules Project by the national rulemakers that produced a catalogue of local rules that went beyond the apparent authority for local rulemaking.[50] At the same time, local rules can be a proving ground for reforms that eventually find their way into the national rules.

Discovery provides examples of this interaction. A number of amendments to the national discovery rules can be traced to local rule provisions. Thus, numerical limitations on interrogatories and the 2000 amendment to Rule 5(d) to forbid filing of discovery papers can be traced to provisions in local rules that could have been challenged as exceeding the proper scope of local rules. On the other hand, the proliferation of divergent local regimes regarding initial disclosure—though explicitly authorized by the national rules—was an important stimulus behind the 2000 adoption of uniform initial disclosure provisions for the entire nation.

Sometimes the emergence of divergent local rule regimes is— as with the 2000 amendment of Rule 26(a)(1) on initial disclosure—itself a stimulus to national rulemaking. In the view of some, that

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48. Electronic Discovery: Legislation and Rules, (Item W08-01/Leg08-01) (proposed Jan. 2008), *available at* http://www.courtinfo.ca.gov/invitationstocomment/documents/w08-01.pdf (last visited Jan. 9, 2008).

49. *See* Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. (forthcoming 2008) (using example of e-discovery to show that the federal rulemaking process retains the capacity to provide leadership in dealing with new issues).

50. *See* 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FED. PRACTICE & PROCEDURES § 3152, at 498–502 (2d ed. 1997).

situation was beginning to emerge with regard to e-discovery. Here are the views of a corporate general counsel:

> [W]hat we began to see was a series of . . . inconsistent and somewhat troublesome [local] rules being adopted at the local district court level around the United States. Delaware would have one rule. New Jersey would have another rule. They were not consistent, and so a company with multinational . . . or multi-state operations might be facing one series of rules in one place and one in another. The result was we saw a need for a national, federal approach.[51]

This is, however, not the only approach to local rules. Judge Ronald J. Hedges, for example, has lamented that "it is unfortunate that the Judicial Conference or one of the committees on the Judicial Conference thinks as long as three districts have separate rules there is something evil, and you've got to have a national rule to deal with it."[52]

There is likely no all-purpose resolution of the potential tension between local rules and national rules. On the one hand, to have local rules that diverge significantly from national rules can undermine the national scheme. On the other hand, local rules can provide implementing detail that is not appropriate for national rules. They can also respond to local legal culture in a way that would not likely be workable for a national rule. And they probably could be modified much more rapidly than a national rule.

Here in Maryland, the U.S. District Court has adopted not local e-discovery rules but a suggested protocol for e-discovery. It is a remarkably detailed and informative document, and likely to be very useful for counsel. As you review it, consider whether local rules would suitably contain so much detail, and reflect as well on the level of detail that would be suitable in a national rule that cannot be changed in less than five years. It may be that experience under Maryland's suggested protocol will in time provide a basis for adopting local provisions that go beyond suggestions.

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51. Comments by Panelists, *in* THE CHALLENGE OF RULEMAKING, *supra* note 3, at 66, 69–70 (quoting Thomas Y. Allman, Esq.) [hereinafter Comments by Panelists].

52. *Id.* at 74 (quoting Hon. Ronald J. Hedges).

According to one source, a third of the U.S. district courts have adopted e-discovery local rules.[53] So this is another source of rules for those concerned with e-discovery.

C. *International Limitations*

As noted above, the U.S. discovery revolution was not embraced abroad. To the contrary, many countries even adopted "blocking statutes" designed to impede or prevent U.S. discovery on their soil. One could say that the European attitude toward information-disclosure by defendants is the obverse of the American attitude. In this country, the criminal accused has the protection of the Fifth Amendment, but there is no right to remain silent for the accused in most European courts. In civil cases, on the other hand, the Europeans look with alarm at the idea of forcing defendants to reveal possibly harmful information, at least when the force is being applied by private plaintiffs. Here, of course, we have for 70 years embraced very broad privately-controlled information extraction from defendants.

These tensions in attitudes manifest themselves in a number of ways. In the wake of the September 11th attacks, European attitudes toward surveillance of potential terrorists seem to have been more cautious than the U.S. approach. Regarding discovery, the American judicial response has generally been skeptical about limiting U.S. discovery just because the information is located abroad. Thus, the Supreme Court has resisted the notion that U.S. district courts should curtail discovery regarding cases before them in deference to the Hague Evidence Convention[54] and affirmed that American courts have broad authority by statute to authorize U.S. discovery for use in foreign proceedings whether or not the same discovery would be authorized in the court in which the litigation is proceeding.[55] But the Court has recognized that there may be cases in which foreign law prevents a party to a U.S. case from complying with domestic discovery demands.[56]

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53. K & L Gates, http://www.ediscoverylaw.com/2008/02/articles/resources/updated-list-local-rules-forms-and-guidelines-of-united-states-district-courts-addressing-ediscovery-issues/ (last visited Mar. 31, 2008) (listing rules in 38 district courts).

54. Société Nationale Industrielle Aérospatiale v. U. S. Dist. Court, 482 U.S. 522, 539–40 (1987).

55. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 259–63 (2004).

56. *See* Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197 (1958) (overturning litigation-ending sanctions against litigant who could not comply with discovery due to Swiss laws restricting release of information).

There is at least a possibility that e-discovery will prompt a confrontation between the American attitude toward discovery and the European attitude toward privacy in relation to private civil litigation. Without claiming any breadth of understanding of the issues, I can affirm that they have surfaced. Reportedly, European data protection provisions may restrict responses to U.S. e-discovery.[57] There has been at least one effort (unsuccessful) to invoke such protections against a U.S. e-discovery order.[58] So, international limitations on data release constitute another source of directives for e-discovery beyond the Federal Rules.

IV. ARE RULES BETTER?

Having briefly canvassed the various sources of rules on e-discovery, one can turn to the question of whether it is better or worse to have rules. Those considering adopting rules might properly reflect on this question before acting.

The anti-rule view might be summed up by the attitude of a fellow American Law Institute (ALI) member I talked to more than twenty years ago at an ALI function. "The worst thing they ever did," he asserted, "was to create a permanent committee on the Federal Rules." Better, he thought, to leave the rules in their original open-ended form and rely on judges to develop case law to guide other judges on how to apply those rules. This attitudinal difference can be quite basic. When the Model Rules of Evidence were in the drafting stage, for example, John Henry Wigmore (he of the hefty evidence treatise) urged that a detailed set of rules be devised (along the lines of his treatise) to deal specifically with all the problems he had found in a lifetime of reading evidence cases. Charles Clark, who had been Reporter of the committee that drafted the original Federal Rules of Civil Procedure, responded by suggesting that there be only one rule—evidence should be admissible unless its prejudicial effect outweighed its probative value—and that everything else be left to the discretion of the trial judge.

When revisions are suggested for the Federal Rules, one recurrent reaction is that they are not needed. There is often much force to such arguments. Consider, for example, the observations Judge Paul W. Grimm made in a 2003 e-discovery case (although not on the

57. *See, e.g.*, Jaculin Aaron & Laura J. Lattman, *Another Story in Europe*, NAT'L L.J., Dec. 10, 2007, at E1 (discussing possible impact, on U.S. discovery, of stringent European data privacy laws).

58. *See* Columbia Pictures, Inc. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007).

subject of whether there should be Federal Rules e-discovery amendments):

> Under Rules 26(b)(2) and 26(c), a court is provided abundant resources to tailor discovery requests to avoid unfair burden or expense and yet assure fair disclosure of important information. The options available are limited only by the court's own imagination and the quality and quantity of the factual information provided by the parties to be used by the court in evaluating the Rule 26(b)(2) factors.[59]

A plaintiff's lawyer somewhat similarly observed regarding e-discovery that "[w]ithout any rule and without any case law, the state trial court knew how to handle this."[60]

Any rulemakers should consider such a possibility, something like the "first do no harm" attitude of doctors. At least some suggest the amendment to the Federal Rules might not pass this test. One vendor began an assessment of the effect of the Federal Rules amendments by asking, "Have the amended federal rules brought corporate America to its knees?"[61] A partner in a Seattle firm was quoted as saying that "[e]verybody is a little terrified" as the effective date of the rule amendments approached.[62] Around the same time, an article in the *San Francisco Recorder* entitled "Easing the Pain of E-Discovery" and subtitled "New Discovery Rules Giving You a Headache?" began by saying:

> I wish I could say take two aspirin and call me in the morning, but solving the technological headaches attorneys will undoubtedly grapple with under the framework of the new Federal Rules of Civil Procedure will require a much stronger dose of medicine, not to mention a dose of reality.[63]

In the same vein, a California lawyer reacted to the recent proposals to adopt e-discovery rules for the California state courts by

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59. Thompson v. U. S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 98–99 (D. Md. 2003).

60. Comments by Panelists, *supra* note 51, at 73 (quoting Michael J. Ryan, Esq.)..

61. Arkfeld, *supra* note 11, at 3.

62. Leigh Jones, *E-Discovery Zero Hour Approaching*, NAT'L L.J., Aug. 21, 2006, at 1.

63. Matthew D. Nelson, *Easing the Pain of E-Discovery: New Discovery Rules Giving You a Headache? Follow These Tips to Keep Costs Down and Make the Process Smooth and Efficient*, S.F. RECORDER, Aug. 23, 2006, at 5.

saying that it would have been "more prudent" to wait and see what happens as lawyers practice under the new Federal Rules.[64] And the malpractice fearmongers quoted earlier observe that the Federal Rules amendments "have raised the stakes."[65] Although this attitude is not universal,[66] it may provide a caution for those considering adopting e-discovery rules in other sectors.

Frankly, I find it implausible that doing e-discovery without rules is really superior to having rules to provide guidance. Of course, for those who thought Federal Rules would really tell them "exactly what to do," the actual rules may be disappointing. And some may have been hoping to pretend electronically stored information is not there, and limit discovery to hard-copy materials. One suggestion of this view is the observation in an article in the *California Lawyer* in February 2008 that "amendments to the Federal Rules of Civil Procedure that went into effect in 2006 essentially elevated electronic discovery from a best practice to a mandatory practice."[67] But these amendments don't mandate any form of discovery; they only instruct about how to handle e-discovery if it occurs. Maybe in the short term having such rules makes it more likely that litigants will think about seeking this material through discovery, but it is hard to believe that they would abstain from demanding it for long whether or not rules mentioned the possibility.

Another possibility is that having rules is not a problem in the abstract, but that *these* particular rules are so bad that they are worse than no rules at all. That possibility seems unpersuasive, however, in light of the widespread emulation of provisions of the Federal Rules amendments in state court rules dealing with e-discovery.

In any event, it seems worthwhile to itemize some characteristics of the Federal Rules provisions that may prove informative to other potential rulemakers:

(1) The amendments emphasize party agreement. Rather than dictate the answers to a variety of questions such as the form of production or the breadth of searches for responsive materials or the preservation of electronically stored information, the rules direct the

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64. Matthew Hirsch, *News Keeps E-Discovery on Radar in State*, S.F. RECORDER, Jan. 24, 2008, at 1, 10.

65. Kwuon & Wan, *supra* note 12, at E2.

66. *See, e.g.*, Joseph Burton, *Rules of Evidence Should Codify Challenges of Digital Age*, S.F. DAILY J., Jan. 11, 2008, at 6 ("On the eDiscovery front, our ability to respond to the changes in practice required by this information has been eased by December 2006 amendments to the Federal Rules of Civil Procedure.").

67. McNichol, *supra* note 22, at 37.

parties to talk about it. In this way, they can design the most suitable arrangements for their cases.

(2) The amendments also emphasize judicial supervision. Recall that the message from lawyers over a decade ago about what they needed in discovery—parental supervision. The amended rules provide a vehicle for such supervision when needed. If the parties cannot agree on any of a variety of issues, they can submit them to the judge for resolution.

(3) The amendments avoid detailed directives. To the disappointment of lawyers who wanted rules that would "tell them exactly what to do," these rules do not. Rulemakers' knowledge of the specifics of given cases is limited. Their ability to foresee the evolution of technology is possibly even more limited. So the application of the rules can evolve as technology evolves. Under Rule 26(b)(2)(B), for example, the determination of whether certain sources of electronically stored information are reasonably accessible could easily change as new technology makes such information accessible in new ways.

(4) The amendments emphasize the desirability of focusing on e-discovery early. There have been far too many stories of avoidable calamities already in the annals of e-discovery history. At the same time, the premium on early focus can provide those who are well prepared with an advantage. Litigants who are prepared to go to a Rule 26(f) conference with an informed and fair set of proposals will often benefit. If the other side won't agree, they should be in a good position to persuade the judge that their proposals are reasonable. If the other side just says, "Do whatever you want to do, I don't have to assent," they will not likely get into trouble later for doing what they said they would do.

(5) The Federal Rules amendments place an emphasis on pragmatism. Some seem to regard discovery as inherently either good or bad. Thus, some lawyers argue that they have a "right" to do discovery of certain dimensions. Although the objective of federal discovery is unquestionably to provide legitimate access to necessary evidence, it is often not helpful to treat this objective as conferring a "right" to a certain amount. Neither does a responding party's assertion that it has provided a certain amount of discovery inherently entitle it to refuse to provide more. With e-discovery, as with all discovery, the goal should be to bring a rule of reason to allocation of burdens in a given case.

V. CONCLUDING OBSERVATIONS

Some may be tempted to agree with the lawyer who recently opined that "[k]eeping up with the subject of electronic discovery is a lot like following the latest developments in the lives of Britney Spears or Lindsay Lohan: every week a new story and never good news."[68] I hope most have a more sanguine outlook.

For me, having spent much of the last decade focused on e-discovery, it is interesting to consider how differently we might look at e-discovery in another decade. The rate of change is likely to abate somewhat, but given how different things are now from how they were a decade ago it seems dubious to expect that things will remain the same. So I'm not going to try to make predictions. Rather, I have some observations about how things may evolve and some questions about whether the fears of the past become the reality of the future.

(1) *E-discovery may become more democratic.* Until recently, it has seemed to be a prime example of what is sometimes called "one-way discovery," generally typified by a suit by an individual plaintiff against an organizational defendant, often a corporation. The assumption has been that only the defendant has any significant amount of information or risks problems with preservation and the like.

Computer use is no longer the preserve of the big corporation, and computer capabilities mean that large numbers of Americans have accumulated large amounts of electronically stored information. So preservation and access may begin to be headaches for parties on both sides of the "v." At least some cases show that discovery is sought from plaintiffs as well as defendants. For example, Judge John M. Facciola recently ordered a plaintiff in a workplace harassment suit to produce images stored on his cell phone in response to a discovery demand by a defendant.[69]

Somewhat similarly, it seems that litigants are increasingly finding social networking sites a fruitful source of potential evidence. An article in the *National Law Journal* in October 2007 reported that "[l]awyers in civil and criminal cases are increasingly finding that social networking sites can contain treasure chests of information for their cases."[70] In a recent New Jersey case, an insurer that was sued

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68. John J. Coughlin, *Learning from the E-Discovery Mistakes of Others*, NAT'L L.J., Dec. 10, 2007, at E4.

69. Smith v. Café Asia, 246 F.R.D. 19 (D.D.C. 2007).

70. Vesna Jaksic, *Litigation Clues Are Found on Facebook*, NAT'L L.J., Oct. 15, 2007, at 1.

for failure to pay health benefits for an alleged disability obtained an order that plaintiffs turn over postings on MySpace and Facebook, as well as mirror images of the hard drives of all the computers used by plaintiffs' families so defendant could check on statements about their health conditions.[71]

(2) *The enduring prominence of vendors is uncertain.* A straight-line projection of vendor income a decade from now would lead to an astronomical figure. From almost nothing in 2001 or 2002, they are expected to exceed $3 billion this year (2008) and $4 billion next year (2009); where this trend could lead at the end of another ten years is hard to imagine. But it is also a bit hard to imagine that law firms and corporate clients would willingly pay such amounts for the open-ended future rather than taking the work in-house somehow. There is at least some reason for caution in addressing vendors' claims. As Judge Hedges has said, "Wherever you go, you'll see a vendor who can do something better than the last vendor did and will promise you that he or she will deliver something at half cost."[72] At some point, something has got to give.

(3) *Access to an opposing party's computer system may become a fertile field for litigation.* Another change made in 2006 was little remarked upon at the time but might prove significant: Rule 34(a)(1) now provides not only that a party may request an opportunity to "copy" another party's documents or electronically stored information, but also to "test" or "sample" them. Previously that testing and sampling option had been explicitly provided only with regard to tangible things. Before this change, at least one court of appeals had overturned an order authorizing direct access to an opposing party's computer system.[73] Although the Advisory Committee's note sought to limit this possibility,[74] an interesting

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71. Mary Pat Gallagher, *MySpace, Facebook Pages May Aid Insurance Dispute*, S.F. RECORDER, Feb. 4, 2008, at 3.

72. Comments by Panelists, *supra* note 51, at 74 (quoting Hon. Ronald J. Hedges).

73. *See In re* Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (parties are not entitled to "unlimited, direct access to [the other party's] databases . . . without—at the outset—a factual finding of some non-compliance with discovery rules").

74. The Advisory Committee's note cautioned as follows:

> Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in

question could arise about whether this new permission would often be used to justify access to an opposing party's electronic information system. This provision has begun to receive some attention,[75] and handling of such access deserves continued attention.

(4) *There may be a new or enlarged role for Rule 26(g).* Rule 26(g) was added in 1983, at the same time that Rule 11 was substantially revised to strengthen its provisions. At the time, it was expected (perhaps hoped) that Rule 26(g) would be just as important as Rule 11.[76] Needless to say, that did not happen. Amended Rule 11 mushroomed into the most prominent rule of its day, eventually being narrowed in 1993 to contain its effects. Rule 26(g) slipped from view, and had minimal effect.

It is possible that e-discovery will breathe new life into Rule 26(g). The extensive responsibilities of counsel in regard to consultations about e-discovery arrangements call for counsel to make representations to the other side, and sometimes to the court, about what can be done and when it can be done. Recently, some courts have reacted to unfounded (perhaps not entirely honest) statements as violating Rule 26(g).[77] Maybe it will become the "new Rule 11."

(5) *There could be new pressures on outside counsel.* The people who sign discovery papers and are subject to Rule 26(g) sanctions are usually outside counsel. Often they act in reliance on what they are told by inside counsel or by other insiders at the organizational client. In the words of one former general counsel, "There is a major distinction in America between what outside . . . and inside lawyers

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> some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

FED. R. CIV. P. 34(a) advisory committee's note to the 2006 amendments.

75. *See, e.g.*, Nolan M. Goldberg, *Discovery and the Reluctant Host*, NAT'L L.J., March 10, 2008, at S1 (discussing direct access to an opposing party's computer system).

76. *See* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURES § 2052, at 630 (2d ed. 1994).

77. For application of Rule 26(g) in e-discovery situations, *see* Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) (granting in part and denying in part a defendant's motion for sanctions for failure to produce certain emails during discovery), *enforcing*, 2007 WL 2900537 (S.D. Cal. Sept. 28, 2007), *vacated and remanded in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); Wingnut Films, Ltd. v. Katja Motion Pictures Corp., No. CV 05-1516-RSHL SHX 2007 WL 2758571 (C.D. Cal., Sept. 18, 2007) (partially granting a plaintiff's motion for sanctions due to "significant gaps" in defendant's discovery responses); Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 636–37 (D. Colo. 2007) (a defendant's "failure to comply with the requirements of Rule 26(g)" may deem "that a monetary sanction is appropriate" under the specific facts and circumstances of the case).

think and know about electronic information, and it is not all that favorable to outside lawyers."[78] There certainly have been instances of sanctions on parties when erroneous assertions are made by counsel relying on what they are told by the client.[79] Whether such failures to communicate will produce sanctions directly on counsel under Rule 26(g), remains to be seen.

(6) *The question of whether the bad results some opponents of the Federal Rules amendments predicted have occurred or will occur deserves attention.* During the hearing process, a number of opponents to certain amendments predicted that they would prompt undesirable behavior, principally among prospective defendants. Opponents of the inaccessible information provisions of Rule 26(b)(4)(B) argued that many corporations would revise their electronic information systems to make most information inaccessible. Similarly, opponents of the sanctions limitation now in Rule 37(e) urged that it would prompt corporations to reset their systems to delete information with alacrity. To both arguments, many others responded that this would be foolish behavior for corporations, who rely on preservation of and access to electronic information to run their businesses. Because this was such a frequent theme during the Federal Rules amendment process, it would be very interesting (and quite important) to know whether there is any indication whether the Federal Rules amendments actually produced any change in behavior.

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The bottom line for me is that this has been a fascinating decade. I now look forward to the next decade to answer these questions and learn where e-discovery goes from here.

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78. Comments by Panelists, *supra* note 51, at 70 (quoting Thomas Y. Allman, Esq.).

79. *See, e.g.*, GFTM, Inc. v. Wal-Mart Stores, Inc., No. 98 CIV 7724 RPP 2000 WL 335558 (S.D.N.Y. 2000) (sanctioning defendant after its lawyer assured the court—based on what the in-house contact for outside counsel said—that certain electronically stored information was no longer available, but a later deposition of one of defendant's IT personnel showed that it had been available at the time the representation was made but subsequently destroyed).