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I. INTRODUCTION

[1] When the Federal Rules of Civil Procedure (FRCP) were formally adopted by United States Supreme Court Order on December 20, 1937,[1] the emergence of computers and electronic information and their widespread use were hardly contemplated. Although the Federal Rules of Civil Procedure have been amended on occasion to accommodate changing technology, the advent of the computer age creates new challenges for litigants, their attorneys, and the courts as they strive to apply traditional rules in an innovative technological environment. This article discusses just one aspect of that challenge: the fact that the vast majority of information now exists in electronic format and the impact of this reality on initial disclosure requirements under Federal Rule of Civil Procedure 26(a)(1)(B).

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[1] *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §4508 (2d ed. 1996).

II. DISCUSSION

A. *Rule 26(a)(1) Disclosures*

[2] In 1993, the Federal Rules of Civil Procedure were amended to impose upon the parties "a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement."[2] With respect to documents, data compilations, and tangible things, the new rule required each party to "without awaiting a discovery request, provide to other parties . . . a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings."[3] The new rule also required each party to "make its initial disclosures based on the information then reasonably available to it," and stated that the party "is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures."[4]

[3] The primary objective of the initial disclosure obligation is "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information."[5] This objective is consistent with the stated scope and purpose of Federal Rule of Civil Procedure 1, requiring that the Rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action."[6]

[4] Notwithstanding the rationale supporting adoption of the Rule 26(a)(1) initial disclosure provisions, some of the district courts chose to take advantage of a provision under the 1993 rule to "opt out" from the initial disclosure requirements.[7] The 2000 amendment to Rule 26(a)(1), however, "remove[s] the authority of the courts to alter or opt out of the

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[2] FED. R. CIV. P. 26 advisory committee's note, subdivision (a) (1993).
[3] FED. R. CIV. P. 26(a)(1)(B) (1993).
[4] FED. R. CIV. P. 26(a) (2003).
[5] FED. R. CIV. P. 26 advisory committee's note, subdivision (a) (1993).
[6] FED. R. CIV. P. 1 (2003).
[7] 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2053, at 643 (2d ed. 1994 & Supp. 2003).

national disclosure requirements by local rule."[8] This amendment invalidated "not only formal local rules but also informal 'standing' orders of an individual judge or court that purport to create exemptions from – or limit or expand – the disclosure provided under the national rule."[9]

[5] In addition to making the provisions of Rule 26(a)(1)(B) mandatory, the 2000 amendment to the Rule narrowed the initial disclosure obligation from the identification of documents, data compilations, and tangible things that "are relevant to disputed facts alleged with particularity in the pleadings"[10] to those that "the disclosing party may use to support its claims or defenses."[11]

[6] Both the former and current versions of Rule 26(a)(1)(B) designate "data compilations" as materials subject to initial disclosure requirements,[12] and the 1993 Advisory Committee notes make clear that "data compilations" include "computerized data and other electronically-recorded information."[13] The term "data compilation" is borrowed from Federal Rule of Civil Procedure 34(a), which was amended by Congress in 1970 to provide for the discovery of "data compilations from which information can be obtained (or) translated if necessary, by the respondent through detection devices into reasonably usable form."[14] Although the language of the 1970 amendment is somewhat obscure, the 1970 Advisory Committee notes explain that the revision was made "to accord with changing technology."[15]

[7] Since adoption of the 1970 amendment, and in accordance with the Advisory Committee's intention, courts have consistently held that electronic communications and information are discoverable under Rule 34(a).[16] Since the promulgation of Rule 26(a)(1)(B) in 1993, courts have

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[8] FED. R. CIV. P. 26 advisory committee's note, subdivision (a)(1) (2000).

[9] *Id.*

[10] FED. R. CIV. P. 26(a) (1993)

[11] FED. R. CIV. P. 26 (2000).

[12] *Compare* FED. R. CIV. P. 26(a)(1)(B) (1993) *with* FED. R. CIV. P. 26(a)(1)(B) (2000).

[13] FED. R. CIV. P. 26 advisory committee's note, subdivision (b) (1993).

[14] FED. R. CIV. P. 34(a) (1970).

[15] FED. R. CIV. P. 34 advisory committee's note, subdivision (a) (1970).

[16] *See, e.g.*, Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 96-99 (D. Md. 2003); Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn. 2002); Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428

similarly found electronic information subject to initial disclosure requirements.[17]

B. *The Form and Scope of Electronic Information*.

[8] As more and more attorneys realize that computerized data and other electronically recorded information are subject to Rule 26(a)(1)(B) initial disclosure requirements, exclamations of "Do I Really Have To Do That?" echo around the litigation world. To determine the correct answer to this question, litigants must first understand the meaning of the term "electronic information" and how that term differs from information found within traditional paper documents.

[9] As a starting point in understanding the concept of electronic information, it is useful to personally consider these initial questions:

- Do you have a computer in your office?
- Do you have a computer at home?
- Do you have access to the internet?
- Do you use e-mail?
- Do you use voice/phone mail?
- Do you use some form of electronic calendar and/or address book?

[10] All of these applications create and contain electronic information. Thus, if your answer to most of these questions is "yes," your information environment is advancing in line with the rest of the world, and you now have some understanding of what electronic information is and where it is located.

[11] Historically, most information was created and stored in some type of printed form. In the 21st century, however, the vast majority of records are created and stored electronically. More specifically, recent research

(S.D.N.Y. 2002); McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001); Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000); Playboy Enters. Inc. v. Welles, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999); Daewoo Elec. Co. v. United States, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986); Bills v. Kennecott Corp., 108 F.R.D. 459, 461 (D. Utah 1985).

[17] *See In re* Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437, 441-42 (D.N.J. 2002); Kleiner v. Burns, 48 Fed. R. Serv. 3d (West) 644, 2000 WL 1909470, at *2 (D. Kan. Dec. 15, 2000) (Waxse, J.).

reveals that ninety-two percent of all information created during 2002 was generated in digital form on computers of some sort, and, thus, only eight percent was generated using non-electronic media.[18] In fact, "businesses in North America sent an estimated 2.5 trillion e-mail messages [in 2001], expected to grow to 3.25 trillion in 2002."[19] Nearly all conventional commercial documents originate as computer files and nearly all business activities, from buying gas at the pump to international commodities trading, are transacted using computer-based business processes while creating electronic information.

[12] Simply put, electronic information is information created or stored in digital form whenever a computer or similar machine is used to accomplish a task, such as computer generated communications (e.g., e-mail, faxes, and voice-mail), word processing, data storage, and data management. This list is obviously not exhaustive. Even when the information is created on a laptop or desktop computer in the typical computing environment, it is often transmitted and stored in many different locations as a result of either network connections or e-mail transmissions. Thus, electronic information may be found on network server files, backup tapes, CD-ROMs, or external hard disc drives, as well as a host of other locations within the computing environment.

[13] Although courts, attorneys, and legal commentators alike agree that computerized data and other electronically-recorded information are subject to Rule 26(a)(1)(B) initial disclosure requirements, many issues remain unsettled. As a preliminary matter, the scope of electronic information that qualifies as "computerized data and other electronically-recorded information" can be enormous, encompassing: voice-mail, e-mail, deleted voice-mail and e-mail, data files, program files, back-up files, temporary files, system history files, website information in textual, graphical or audio format, website files, cache files, "cookies," and other electronically stored information. Not only is the scope of qualifying electronic information enormous, but discovering the source of this information is often an overwhelming task. For example, such

[18] Peter Lyman & Hal R. Varian, *How Much Information*, University of California at Berkeley, School of Information Management and Systems (Oct. 27, 2003), *at* http://www.sims.berkeley.edu/how-much-info-2003.

[19] Kristin M. Nimsger, *Digging for E-Data*, 39 TRIAL MAGAZINE 56 (2003) (citation omitted), *available at* http://www.krollontrack.com/LawLibrary/Articles/trial_nimsger.pdf (last visited Feb. 26, 2004).

information can be found in personal digital assistants (like the PalmPilot), network hard drives, and archival tapes, as well as removable media like floppy disks, tapes, and CD-ROMs.

[14] In addition to the many forms of electronic information and the various locations where such information can be found, significant differences exist between traditional paper information and electronic information. Recognizing these differences is essential to fully understanding the challenges presented by Rule 26(a)(1)(B) disclosure requirements. First, electronic communications often are less formal than paper transmissions and, thus, are likely to yield more candid information. Second, numerous background facts ("meta-data") – including dates, times, and locations of access, as well as identification of the accessing user – are documented each time electronic information is created, modified, or accessed. As a general rule, this information is not readily accessible, if accessible at all, in traditional paper documents. Third, electronic information tends to be distributed more widely than paper documents, most likely because of the ease and inexpensive cost associated with e-mail and network communications. Fourth, electronic information is almost impossible to completely destroy or eliminate, whereas a paper document is relatively easy to destroy. Finally, the storage and retrieval methods for electronic information are significantly more complex than for paper documents.

C. *Kleiner v. Burns*.

[15] One of the first cases to address electronic information in the context of Rule 26(a)(1)(B) disclosures is *Kleiner v. Burns*.[20] *Kleiner* involved a claim of copyright infringement arising out of the display of photographs taken by the plaintiff.[21] The copyrighted photographs were posted on a web page hosted by the internet service provider Yahoo![22] without the plaintiff's permission.[23] The plaintiff sued Yahoo!, among others, and moved to compel Yahoo! to make certain initial Rule 26(a)(1)(B) disclosures that included (but were not limited to) data compilations in its

[20] Kleiner v. Burns, 48 Fed. R. Serv. 3d. (West) 644, 2000 WL 1909470 (D. Kan. Dec. 15, 2000) (Waxse, J.).

[21] *Kleiner*, 2000 WL 1909470, at *1.

[22] *Id*.; *see also* Yahoo!, *at* http://www.yahoo.com (last visited Mar. 26, 2004).

[23] *Kleiner*, 2000 WL 1909470, at *1.

possession.[24] In response, Yahoo! claimed not to have *any* data compilations relevant to the lawsuit.[25]

[16] Given the nature of Yahoo!'s business, the court found it implausible that Yahoo! did not have any relevant data compilations.[26] The court's treatment of Yahoo!'s claim seemed to imply that Yahoo! was not taking its disclosure obligations seriously.[27] The court granted the plaintiff's motion to compel, spelling out Yahoo!'s specific disclosure obligations in its order.[28]

[17] The court first instructed that Rule 26(a)(1)(B) requires a party to "describe and categorize, to the extent identified during the initial investigation, the nature and location of potential relevant documents and records, including *computerized data and other electronically-recorded information*."[29] Referring directly to the Federal Rules of Civil Procedure, the court noted that the party's description and categorization must be sufficient to enable opposing parties "(1) to make an informed decision concerning which documents might need to be examined… and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests."[30]

[18] The court then provided a non-exhaustive list of what the term "computerized data and other electronically-recorded information," as used by the advisory committee, includes:

> voice mail messages and files, back-up voice mail files, e-mail messages and files, backup e-mail files, deleted e-mails, data files, program files, backup and archival tapes, temporary files, system history files, web site information stored in textual, graphical or audio format, web site log files, cache files, cookies, and other electronically-recorded

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[24] *Id.* at *3.

[25] *Id.* Yahoo! claimed that "all relevant electronic data in its possession, custody and control" had been surrendered. *Id.*

[26] *Id.* at *4.

[27] *Id.*

[28] *Id.* at *4-*5.

[29] *Id.* at *4 (quoting FED. R. CIV. P. 26 advisory committee's notes, 1993 amendments).

[30] *Id.*

> information.[31]

The court further instructed that the disclosing party is required to take "reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any 'deleted' electronic data."[32]

[19] To help practitioners understand the retrieval of "deleted" electronic data and the use of back-up and archival files and tapes, the court quoted from an article published in the *John Marshall Journal of Computer and Information Law*:

> Back-up copies of files may be available as a result of formal or informal preservation of information. Formally, companies often make timed back-ups of all of the information stored on a computer network at given points. These archival tapes[33] may be preserved for short periods

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[31] *Id.* (citation omitted).

[32] *Id.*

[33] After handing down the *Kleiner* decision, the author communicated with Ken Withers, an expert on discovery of electronic evidence in civil litigation at the Federal Judicial Center. As a result of this exchange, the author determined that the above-quoted information needed clarification in that it uses two terms interchangeably: "backups" and "archives." Although professionals often apply the terms loosely, these are two distinct concepts. According to Mr. Withers:

> **A backup tape** is a huge, undifferentiated, and usually compressed file that is created for system-wide disaster recovery purposes. It is contemplated that if it needs to be used, it will be used in its entirety to restore all of a system's data and functionality, after which individual files can be located. It is not contemplated that individual files can be located on a backup tape short of full restoration, which is a costly and time-consuming process. Therefore, while the data may exist on a backup tape, it isn't readily accessible. The existence of the backup tape is subject to disclosure, after which the parties can go before the judge and argue the benefits and burdens of production under Rule 26(b)(2)(i)-(iii).
>
> **Archival data** are something different: in a true archive, files have been selected for their informational, business, and legal significance, and organized in some fashion for individual retention and access. Although the data are not active and may not be maintained in their native format (electronic images in ".tif" format are most common), they are maintained in archival form, with individual file accessibility,

> of time as a source of memory in the event of an emergency such as accidental deletion or loss of important data. Subsequently, such tapes may be recycled for further archiving or other use. Archival tapes may also be preserved for longer periods of time either because of government-mandated record keeping requirements or simply for purposes of historical preservation. Informally, employees may make their own random back-up copies of files to guard against accidental deletion or system failure. These back-ups may employ different file names. Indeed, different versions of evolving documents may be saved under different file names.
>
> Consequently, there are several sources for retrieving deleted documents or drafts of documents. Archival tapes may contain final versions and drafts of documents that were subsequently deleted from the hard disk on a computer terminal or network file server. Similarly, copies or drafts of deleted documents may still be found on the hard disk of a computer terminal or network file server under different file names than the file that was deleted.[34]

D. *Practical Tips for Attorneys – "How Do I Do That?"*

[20] Keeping in mind the universe of electronic information potentially subject to Rule 26(a)(1)(B) initial disclosure requirements and the distinction between traditional paper and electronic information, what are some practical tips attorneys can use? The District of Kansas has adopted Electronic Discovery Guidelines that provide specific instructions to attorneys regarding discovery of electronic information.[35] To bring those guidelines to the attention of counsel, the Initial Order Regarding Planning

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> to fulfill business and legal requirements. Disclosure is required, and production pursuant to later requests should be uncontested, absent privilege or relevance disputes.

See generally http://www.kenwithers.com; *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (January 2004), *available at* http://www.thesedonaconference.org/publications_html.

[34] *Kleiner*, 2000 WL 1909470, at *4 n.7 (quoting Mark D. Robins, *Computers and the Discovery of Evidence—A New Dimension to Civil Procedure*, 17 J. MARSHALL J. COMPUTER & INFO. L. 411, 416-17 (1999) (citations omitted)).

[35] *See infra* Appendix.

and Scheduling advises attorneys as follows:

> Electronic information falls within the definition of "documents" or "data compilations" in Fed. R. Civ. P. 26(a)(1)(B) and Fed. R. Civ. P. 34(a). Prior to the Fed. R. Civ. P. 26(f) conference, counsel should carefully investigate their clients' information management systems to determine whether discoverable information exists in electronic form. If such information exists, counsel should review the Electronic Discovery Guidelines on the court's website [www.ksd.uscourts.gov].[36]

[21] As the guidelines explain, attorneys must be able to understand their client's computer system and how the client uses technology and electronic media, so that the attorney can be prepared to answer questions about the client's use of backup or archival tapes, use of DVD for storage, searches on individual computers, etc.[37] For example, if the client is accused of failing to search backup or archival tapes, it is important to know whether the client utilizes such a procedure. Without this information, an attorney will not be able to represent to the court that his or her client has satisfied the obligation to produce computerized data and electronic compilations pursuant to Federal Rule of Civil Procedure 26(a)(1)(B). To make that obligation clear the guidelines provides as follows:

> **Duty to disclose.** Disclosures pursuant to Fed. R. Civ. P. 26(a)(1) must include electronic information. To determine what information must be disclosed pursuant to this rule, counsel shall review with their clients the clients' electronic information files, including current files as well as back-up, archival, and legacy computer files, to determine what information may be used to support claims or defenses (unless used solely for impeachment). If disclosures of electronic information are being made, counsel shall also identify those

[36] Initial Order Regarding Planning and Scheduling for Judge Waxse, District of Kansas (on file with Richmond Journal of Law & Technology). The Initial Order is issued pursuant to D. Kan. Rule 16.1.

[37] *See infra* Appendix.

> individuals with knowledge of their clients' electronic information systems who can facilitate the location and identification of discoverable electronic information.[38]

[22] It also is important for attorneys to understand what it means when their client states that electronic data has been "deleted." Contrary to what many believe, stored information is not deleted merely by clicking on the "delete" button. This is true regardless of which electronic medium is used for storage. Although computers may attempt to eliminate stored information by "overwriting" the information – with new information stored in the same space – the overwritten material is not necessarily "deleted." As Mark Robins stated in his article in the *John Marshall Journal of Computer and Information Law*:

> When a user clicks on the delete option, the computer simply marks the file on the hard disk to be overwritten with new information. The file that was purportedly deleted, however, may not be overwritten for seconds, days, or even months. Not only do these "deleted" files continue to exist until overwritten, but, even when they are overwritten, the overwriting process may not wipe out the entirety of the original file. Specifically, portions of files may survive the overwriting process, because software programs generally allocate more space to a given file than is necessary. Thus, between the end of the memory block allocated to store a file and the "end of file" marker demarcating the end of whatever space is actually needed to store that file, there may lie remnants of files that have been partially overwritten. Similarly, reusing an archived magnetic tape may not eliminate all of the information earlier stored on it. If the new information archived consumes a smaller portion of the tape than the information previously archived, then some of the old information will be retained "off the end" of that part of the tape that remains active.[39]

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[38] *See infra* Appendix.

[39] Mark Robins, *Computers and the Discovery of Evidence—A New Dimension to Civil Procedure*, 17 J. MARSHALL J. COMPUTER & INFO. L. 411, 417 (1999) (citations omitted).

[23] In light of the above, attorneys need to remember that, in most cases, "deleted" information may very well still exist and will need to be disclosed or produced. In most situations, responding to a motion to compel with, "Gosh, Judge, we can't find any documents" or "the documents have been deleted," will not likely suffice.

[24] Finally, as discussed above, attorneys need to remember that the Federal Rules of Civil Procedure are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action."[40] Although Rule 26(a)(1)(B) requires every party to make full disclosure of electronic data that the party may use to support its claims or defenses, the parties should consider the costs and burdens of disclosing each category of electronic data. This issue should be discussed at the Rule 26(f) meeting in terms of narrowing the scope of the disclosures or agreeing to the sequence and costs of disclosures. If informal discussions fail, the issue should be raised at the Rule 16 conference. If that too fails, it may be necessary to file a motion for protective order to balance the disclosure requirements with the need to provide a speedy and inexpensive process.[41]

[25] Simply put, an attorney has to determine whether there is electronic information that needs to be disclosed. Only in the rarest of cases should an attorney represent that his or her client has no electronic data to disclose. In this age of computers, it is an implausible response. Thus, the answer to the question "Do I have to really have to do that?" is a resounding "Yes."

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[40] FED. R. CIV. P. 1.

[41] The advisory committee note to Federal Rule of Civil Procedure 34, which applies to requests for production, provides guidance in balancing mandatory disclosure of computerized records against the burdens placed on the respondent:

> 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 nondiscoverable matters, and costs.

FED. R. CIV. P. 34, advisory committee's note. Although the advisory committee note applies to Rule 34 requests for production, the policy considerations behind it apply equally to Rule 26(a)(1)(B) disclosures.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
ELECTRONIC DISCOVERY GUIDELINES*

1. **Existence of electronic information**. With respect to the discovery of electronic information, prior to the Fed. R. Civ. P. 26(f) conference, counsel should become knowledgeable about their clients' information management systems and their operation, including how information is stored and retrieved. In addition, counsel should make a reasonable attempt to review their clients' electronic information files to ascertain their contents, including archival, back-up, and legacy data (outdated formats or media).

2. **Duty to disclose.** Disclosures pursuant to Fed. R. Civ. P. 26(a)(1) must include electronic information. To determine what information must be disclosed pursuant to this rule, counsel shall review with their clients the clients' electronic information files, including current files as well as back-up, archival, and legacy computer files, to determine what information may be used to support claims or defenses (unless used solely for impeachment). If disclosures of electronic information are being made, counsel shall also identify those individuals with knowledge of their clients' electronic information systems who can facilitate the location and identification of discoverable electronic information.

3. **Duty to notify**. A party seeking discovery of computer-based information shall notify the opposing party of that fact immediately, and, if known at the time of the Fed. R. Civ. P. 26(f) conference, shall identify as clearly as possible the categories of information that may be sought.

4. Duty to meet and confer regarding electronic information. During the Fed. R. Civ. P. 16(f) conference the parties shall confer regarding the following matters:

(a) 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. Counsel shall also attempt to agree on the steps the parties will take to comply with the decisions and rules requiring the preservation of potentially relevant information after litigation has commenced.

(b) E-mail information. Counsel shall attempt to agree on the scope of e-mail discovery and e-mail search protocol.

(c) Deleted information. Counsel shall attempt to agree on whether deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.

(d) Back-up and archival data. Counsel shall attempt to agree on whether back-up and archival data exists, the extent to which back-up and archival data is needed, and who will bear the cost of obtaining such data.

(e) Costs. Counsel shall discuss the anticipated scope, cost, and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business, and shall attempt to agree on the allocation of costs.

(f) Format and media. Counsel shall discuss and attempt to agree on the format and media to be used in the production of electronic information.

(g) Privileged material. Counsel shall attempt to reach an agreement regarding what will happen in the event privileged electronic material or information is inadvertently disclosed.

*Approved on February 13, 2004.