

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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Clerk of the Courts

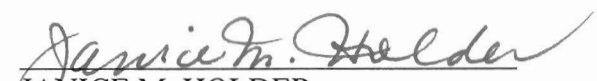
IN RE: AMENDMENTS TO TENNESSEE RULES OF CIVIL
PROCEDURE (E-DISCOVERY AMENDMENTS)

ORDER

The Court adopts the attached amendments pertaining to the discovery of electronically stored information, effective July 1, 2009, subject to approval by resolutions of the General Assembly. The rules amended are as follows:

- RULE 16.01 SCHEDULING AND PLANNING CONFERENCES AND ORDERS
- RULE 26.02(1) DISCOVERY SCOPE AND LIMITS - IN GENERAL
- RULE 26.02(5) CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL
PREPARATION MATERIALS
- RULE 26.06 DISCOVERY CONFERENCE
- RULE 33.03 INTERROGATORIES TO PARTIES - OPTION TO PRODUCE
BUSINESS RECORDS
- RULE 34.01 PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY
UPON LAND FOR INSPECTION AND OTHER PURPOSES -
SCOPE
- RULE 34.02 PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY
UPON LAND FOR INSPECTION AND OTHER PURPOSES -
PROCEDURE
- RULE 37.06 FAILURE TO MAKE OR COOPERATE IN DISCOVERY:
SANCTIONS - ELECTRONICALLY STORED INFORMATION
- RULE 45.02 SUBPOENA - FOR PRODUCTION OF DOCUMENTARY
EVIDENCE
- RULE 45.04 SUBPOENA FOR DEPOSITIONS - PLACE OF DEPOSITION
- RULE 45.07 PROTECTION OF PERSONS SUBJECT TO SUBPOENA
- RULE 45.08 DUTIES IN RESPONDING TO SUBPOENA.

FOR THE COURT:


JANICE M. HOLDER
CHIEF JUSTICE

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 16

SCHEDULING AND PLANNING, PRETRIAL, AND
FINAL PRETRIAL CONFERENCES AND ORDERS

[Amend Rule 16.01 by adding new paragraph designations (1), (2) and (3); by redesignating the existing enumerated paragraphs as paragraphs (A), (B) and (C); and by adding new items (B) and (C) in paragraph (2) and redesignating existing item “(2)” in that paragraph as item (D).]

16.01. Scheduling and Planning Conferences and Orders.— (1) In any action, the court may in its discretion, or upon motion of any party, conduct a conference with the attorneys for the parties and any unrepresented parties, in person or by telephone, mail, or other suitable means, and thereafter enter a scheduling order that limits the time:

(A) to join other parties and to amend the pleadings;

(B) to file and hear motions; and

(C) to complete discovery.

(2) The scheduling order also may include:

(A) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(B) provisions for the discovery of electronically stored information;

(C) any agreements the parties reach for asserting claims of privilege or of protection as to trial-preparation material after production, or in reference to electronically stored information; and

(D) any other matters appropriate in the circumstances of the case.

(3) In deciding the content of any scheduling order, the court shall give consideration to minimizing the time that jurors are not directly involved in the trial or deliberations. A schedule once ordered shall not be modified except by leave of the judge upon a showing of good cause.

2009 Advisory Commission Comments

The amendment to Rule 16.01 is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery

is expected to occur. Rule 26.06 is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise. Rule 16.01 is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26.06 is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

[Amend Rule 26.02(1) by adding the underlined language in the first paragraph, by adding the following new second paragraph, and by adding the underlined language in the third paragraph (previously paragraph two).]

26.02. Discovery Scope and Limits. — Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **IN GENERAL.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things, and electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden and cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, e.g., where the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. The court shall specify conditions for the discovery.

The frequency or extent of use of the discovery methods set forth in subdivision 26.01 and this subdivision shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision 26.03.

2009 Advisory Commission Comments

Rule 26.02 is amended to parallel Rule 34.01 by recognizing that a party must provide discovery of electronically stored information as well as documents that it may use to support its claims or defenses. The term “electronically stored information” has the same broad meaning in Rule 26.02 as in Rule 34.01. The term “data compilations” is deleted as unnecessary because it is a subset of both documents and electronically stored information.

Rule 1(3) of the *Uniform Rules Relating to Discovery of Electronically Stored Information*, National Conference of Commissioners On Uniform State Laws (2007), states: “‘Electronically stored information’ means information that is stored in an electronic medium and is retrievable in perceivable form.”

The amendment to Rule 26.02 is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. The amendment is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the 26.02 limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of — and the ability to search — much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties’ discovery needs. In many circumstances the

requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26.02 that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26.02, through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be

obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26.02 limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26.02 continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

[Amend Rule 26.02(5) by adding new second paragraph below.]

26.02. Discovery Scope and Limits. —

* * * *

(5) CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION MATERIALS. * * * *

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

2009 Advisory Commission Comments

The risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. The amendment to Rule 26.02(5) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. The second paragraph of Rule 26.02(5) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

The second paragraph of Rule 26.02(5) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. The second paragraph of Rule 26.02(5) provides a procedure for presenting and addressing these issues. The second paragraph works in tandem with amended Rule 26.06, under which the parties should discuss privilege issues in preparing their discovery plan,

and which, with amended Rule 16, allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26.06 and orders including such agreements entered under Rule 16 may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26.02(5).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26.02(5), paragraph one, there may be no ruling if the other parties do not contest the claim.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

[Amend Rule 26.06 to read, in its entirety:]

26.06. Discovery Conference. —

(1) At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (A) A statement of the issues as they then appear;
- (B) A proposed plan and schedule of discovery;
- (C) Any limitations proposed to be placed on discovery;
- (D) Any other proposed orders with respect to discovery; and

(E) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and the party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

(2) In any case in which an issue regarding the discovery of electronically stored information is raised or is likely to be raised, a judge should encourage counsel to meet and confer in order to voluntarily come to an agreement on the discovery of electronically stored information and on a schedule that will enable discovery to be completed within the time period specified in the Rules of Civil Procedure or by a scheduling order.

(3) In any case in which an issue regarding the discovery of electronically stored information is raised or is likely to be raised, and in which counsel have not reached agreement, a judge upon its own initiative or upon a motion by the attorney for any party may order the attorneys for the parties to appear before it for a conference and, after reasonable notice to and an opportunity to be heard from the parties, may issue an order governing the discovery of electronically stored information.

(4) The judge upon its initiative, or upon a motion by the attorney, may direct the attorneys for the parties to appear before it for a further conference to ascertain whether counsel have reached

any agreements and to address any disputes regarding electronic discovery issues, e.g., (a) the electronically stored information to be exchanged including information that is not readily accessible; (b) the form of production; (c) the steps the parties will take to segregate and preserve relevant electronically stored information; (d) the procedures to be used if privileged electronically stored information is inadvertently disclosed; and (e) the allocation of costs.

(5) Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes; establishing a plan and schedule for discovery; setting limitations on discovery, if any; and, determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

(6) The shifting of discovery costs to the requesting party or the sharing of those costs between the requesting and responding party should be considered when electronically stored information sought is not reasonably accessible information and when restoration and production of responsive electronically stored information from a small sample of the requested electronically stored information would not be sufficient. When these conditions are present, the judge should consider the following factors in determining whether any or all discovery costs should be borne by the requesting party: the extent to which the request is specifically tailored to discover relevant information; the availability of such information from other sources; the total cost of production compared to the amount in controversy; the total cost of production compared to the resources available to each party; the relative ability of each party to control costs and its incentive to do so; the importance of the issues at stake in the litigation; and the relative benefits of obtaining the information.

(7) Subject to the right of a party who properly moves for a discovery conference to a prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

2009 Advisory Commission Comments

Rule 26.06 is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on “issues relating to discovery of electronically stored information”; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26.06 conference depend on the nature and extent of the contemplated discovery and of the parties’ information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases, identification of, and early discovery from, individuals with special knowledge of a party’s computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation (4th)* § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26.02(1), paragraph 2. The parties also may discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34.02 is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34.02 directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34.02 by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Under amended Rule 26.06, the parties may discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This topic applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation (4th)* § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The reference in 26.06(4) to disputes concerning preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. *Ex parte* preservation orders should issue only in exceptional circumstances.

Under amended Rule 26.06, the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach.

These problems often become more acute when discovery of electronically stored

information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26.06 conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection — sometimes known as a “quick peek.” The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26.02(5), paragraph one. On other occasions, parties enter agreements sometimes called “clawback agreements”— that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Rule 16.02 is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26.06(6) regarding reallocation of costs involved in discovery of electronically stored information is based upon Guideline 7 (“Reallocation of Discovery Costs”), *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, Conference of Chief Justices (2006).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 33

INTERROGATORIES TO PARTIES

[Amend Rule 33.03 by adding the underlined language in the first sentence.]

33.03. Option to Produce Business Records. — Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

2009 Advisory Commission Comments

Rule 33.03 is amended to parallel Rule 34.01 by recognizing the importance of electronically stored information. The term “electronically stored information” has the same broad meaning in Rule 33.03 as in Rule 34.01. Much business information is stored only in electronic form; the Rule 33.03 option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33.03 allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33.03 states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it “as readily as can the party served,” and that the responding party must give the interrogating party a “reasonable opportunity to examine, audit, or inspect” the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33.03 by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the responding party’s need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33.03.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 34

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR
INSPECTION AND OTHER PURPOSES

[Amend Rule 34.01 by adding the underlined language, and by deleting the stricken language.]

34.01. Scope. — Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requesting party's behalf, to inspect, and copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images ~~photographs~~, phonorecords, and other data and data compilations stored in any medium from which information can be obtained, ~~translated either directly or, if necessary, after translation~~ by the respondent ~~through detection devices~~ into a reasonably usable form), or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26.02 and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26.02.

2009 Advisory Commission Comments

As originally adopted, Rule 34 focused on discovery of “documents” and “things.” Later, Rule 34 was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term “documents” to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a “document.” Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper.

Rule 34.01 is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of “documents” should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and “documents.”

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34.01 show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34.01 is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as email. The rule covers — either as documents or as electronically stored information — information “stored in any medium,” to encompass future developments in computer technology. Rule 34.01 is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

The Rule 34.01 requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. See *In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

Rule 34.01 is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26.02 and 26.03. 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 34.01 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 some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34.01 is further amended to make clear that tangible things must — like documents and land sought to be examined — be designated in the request.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 34

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR
INSPECTION AND OTHER PURPOSES

[Amend Rule 34.02 by adding the underlined language, and by deleting the stricken language.]

34.02. Procedure. — The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts. The request may specify the form or forms in which the electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event stating the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use.

Unless the parties otherwise agree, or the court otherwise orders:

(1) The party submitting the request may move for an order under Rule 37.01 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(2) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(3) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(4) a party need not produce the same electronically stored information in more than one form.

2009 Advisory Commission Comments

Rule 34.02 provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34.02 is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34.02 permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26.06 is amended to call for discussion of the form of production in the parties' pre-discovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34.02, runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34.01 requires that, if necessary, a responding party “translate” information it produces into a “reasonably usable” form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is “legacy” data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26.06.

Whether or not the requesting party specified the form of production, Rule 34.02 provides that the same electronically stored information ordinarily need be produced in only one form.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 37

FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

[Amend Rule 37 by adding new subsection 37.06, “Electronically Stored Information.”]

37.06. Electronically Stored Information.—

(1) If a party fails to provide electronically stored information and a motion to compel discovery is filed, a judge should first determine whether the material sought is subject to production under the applicable standard of discovery. If the requested information is subject to production, a judge should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party, considering such factors as: the ease of accessing the requested information; the total cost of production compared to the amount in controversy; the materiality of the information to the requesting party; the availability of the information from other sources; the complexity of the case and the importance of the issues addressed; the need to protect privilege, proprietary, or confidential information, including trade secrets; whether the information or software needed to access the requested information is proprietary or constitutes confidential business information; the breadth of the request, including whether a subset (e.g., by date, author, recipient, or through use of a key-term search or other selection criteria) or representative sample of the contested electronically stored information can be provided initially to determine whether production of additional such information is warranted; the relative ability of each party to control costs and its incentive to do so; the resources of each party compared to the total cost of production; whether the requesting party has offered to pay some or all of the costs of identifying, reviewing, and producing the information; whether the electronically stored information is stored in a way that makes it more costly or burdensome to access than is reasonably warranted by legitimate personal, business, or other non-litigation-related reasons; and whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable.

(2) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith, operation of an electronic information system.

2009 Advisory Commission Comments

Rule 37.06(1) is a new rule adopted from Guideline 5 (“The Scope of Electronic Discovery”), *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, Conference of Chief Justices (2006). It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems

creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37.01(2), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37.06(2) applies only to information lost due to the “routine operation of an electronic information system” — the ways in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs. The “routine operation” of computer systems includes the alteration and overwriting of information, often without the operator’s specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37.06(2) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37.06(2) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a “litigation hold.” Among the factors that bear on a party’s good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

The protection provided by Rule 37.06 applies only to sanctions “under these rules.” It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of “sanctions.” It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 45

SUBPOENA

[Amend Rule 45.02 by adding the underlined language in paragraph 1, and by adding new paragraphs 2, 3, and 4.]

45.02. For Production of Documentary Evidence. — A subpoena may command a person to produce and permit inspection, copying, testing, or sampling of designated books, papers, documents, electronically stored information, or tangible things, or inspection of premises with or without commanding the person to appear in person at the place of production or inspection. When appearance is not required, such a subpoena shall also require the person to whom it is directed to swear or affirm that the books, papers, documents, electronically stored information, or tangible things are authentic to the best of that person's knowledge, information, and belief and to state whether or not all books, papers, documents, electronically stored information or tangible things responsive to the subpoena have been produced for copying, inspection, testing, or sampling. Copies of the subpoena must be served pursuant to Rule 5 on all parties, and all material produced must be made available for inspection, copying, testing or sampling by all parties.

A party serving a subpoena requiring production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

An order of the court requiring compliance with a subpoena issued under this rule must provide protection to a person that is neither a party nor a party's officer from undue burden or expense resulting from compliance.

A command to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing, or at a deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

2009 Advisory Commission Comments

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 45.02 is amended to recognize that electronically stored information can also be sought by subpoena. Rule 45.02 is amended to provide that the subpoena can designate a form or forms for production of electronic data.

Rule 45.02 is also amended to provide that a subpoena is available to permit testing and sampling, as well as inspection and copying. This change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information.

Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45.02 with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45.02, paragraphs 2 and 3 have been adopted from Rule 10(c) and (d) of the *Uniform Rules Relating to Discovery of Electronically Stored Information*, National Conference of Commissioners on Uniform State Laws (2007).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 45

SUBPOENA

[Amend Rule 45.04 by adding the underlined language in Rule 45.04(1), sentence 2.]

45.04. Subpoena for Taking Depositions—Place of Deposition. — (1) A subpoena for taking depositions may be issued by the clerk of the court in which the action is pending. If the subpoena commands the person to whom it is directed to produce designated books, papers, documents, electronically stored information, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26.02, the subpoena will be subject to the provisions of Rules 30.02, 37.02 and 45.02.

(2) A resident of the state may be required to give a deposition only in the county wherein the person resides or is employed or transacts his or her business in person, or at such other convenient place as is fixed by an order of the court.

[Amend Rule 45.07 by adding the underlined language.]

45.07. Protection of Persons Subject to Subpoena. — With respect to any subpoena issued under this rule the Court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may: (1) quash or modify the subpoena if it is unreasonable and oppressive; or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable costs of producing the books, papers, documents, electronically stored information, or tangible things.

[Amend Rule 45 by adding new subsection 45.08, “Duties in Responding to Subpoena.”]

45.08 Duties in Responding to Subpoena. —

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same

electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause. The court may specify conditions for the discovery including, but not limited to the allocation of costs pursuant to the guidelines in Rule 26.06.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

2009 Advisory Commission Comments

New Rule 45.08 authorizes the person served with a subpoena to object to the requested form or forms. In addition, Rule 45.08 provides that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45.08 also provides that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

Rule 45.08(2), like amended Rule 26.02(5), adds a procedure for assertion of privilege or of protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26.02(5).

With reference to Rule 45.08(1)(C), Guideline 6 of the *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, Conference of Chief Justices (2006),

states: "In the absence of agreement among the parties, a judge should ordinarily require electronically-stored information to be produced in no more than one format and should select the form of production in which the information is ordinarily maintained or in a form that is reasonably usable."
