

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on
the twenty-fourth day of September in the year two thousand and thirteen:

Present,

HON. RODERICK L. IRELAND)
HON. FRANCIS X SPINA)
HON. ROBERT J. CORDY)
HON. MARGOT BOTSFORD)
HON. RALPH D. GANTS)
HON. FERNANDE R.V. DUFFLY)
HON. BARBARA A. LENK)

ORDERED: That the Massachusetts Rules of Civil Procedure adopted by order dated
July 13, 1973, as amended, to take effect on July 1, 1974, are hereby amended as follows:

Rule 16:	By inserting in the first sentence after the word "parties" the following words: and any unrepresented parties
Rule 16:	By renumbering the current clauses (5), (6), (7), and (8) as (8) (9) (10)(11);
Rule 16:	By inserting after clause (4) the new clauses (5), (6) and (7) attached hereto;

Rule 26(b):	By striking Rule 26(b)(5) and inserting the new Rule 26(b)(5) attached hereto;
Rule 26(c):	By striking clause (2) and inserting in lieu thereof the following clause: (2) that the discovery may be had only on specified terms and conditions, including a designation of the time, place, or manner; or the sharing of costs;
Rule 26:	By inserting the new section (f) attached hereto;
Rule 34:	By striking Rule 34 (including the title) and inserting in lieu thereof the new Rule 34 attached hereto;
Rule 37:	By inserting the new section (f) attached hereto;
Rule 45:	By striking section (b) and inserting in lieu thereof the new section (b) attached hereto;
Rule 45:	By inserting in the second sentence of section (d)(1) after the word "documents," the following words: electronically stored information
Rule 45:	Section (d)(1) is further amended by inserting in the third sentence after the word "documents," the following words: electronically stored information,
Rule 45:	By re-designating current section (f) as section (g) and inserting the new section (f) attached hereto.

The amendments accomplished by this order shall take effect on January 1, 2014.

<u>RODERICK L. IRELAND</u>)	Chief Justice
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<u>FRANCIS X. SPINA</u>)	
)	Justices
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<u>ROBERT J. CORDY</u>)	
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<u>MARGOT BOTSFORD</u>)	
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<u>RALPH D. GANTS</u>)	
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<u>FERNANDE R.V. DUFFLY</u>)	
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<u>BARBARA A. LENK</u>)	

RULE 16. PRE-TRIAL PROCEDURE: FORMULATING ISSUES

- (5) The timing and extent of discovery;
- (6) The preservation and discovery of electronically stored information;
- (7) Agreements or proceedings for asserting claims of privilege or of protection as trial preparation material after information is produced;

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Rule 26(b)(5)

(5) *Claims of Privilege or Protection of Trial Preparation Materials.*

(A) *Privilege Log.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as material in anticipation of litigation or for trial, the party shall make the claim expressly and, without revealing information that is privileged or protected, shall prepare a privilege log containing the following information: the respective author(s) and sender(s) if different; the recipient(s); the date and type of document, written communication or thing not produced; and in general terms, the subject matter of the withheld information. By written agreement of the party seeking the withheld information and the party holding the information or by court order, a privilege log need not be prepared or may be limited to certain documents, written communications, or things.

(B) *Information mistakenly produced; claim of privilege.* If information produced in discovery 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 shall promptly return, sequester, or destroy the specified information and any copies it has; shall not use or disclose the information until the claim is resolved; shall take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under Trial Court Rule VIII, Uniform Rules on Impoundment Procedure, for a determination of the claim. The producing party shall preserve the information until the claim is resolved.

In resolving any such claim, the court should determine whether:

- (i) the disclosure was inadvertent;
- (ii) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (iii) the holder promptly took reasonable steps to rectify the error

(C) *Effect of a ruling.* If the court, following such procedure, or pursuant to an order under Rule 26(f)(3), upholds the privilege or protection in a written order, the disclosure shall not be deemed a waiver in the matter before the court or in any other proceeding.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Rule 26(f)

(f) Electronically Stored Information.

(1) *Definition.*

“Inaccessible electronically stored information” means electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.

(2) *Electronically Stored Information Conferences.*

(A) *Conference as of right.* Upon the written request of any party made no later than 90 days after the service of the first responsive pleading by any defendant, the parties shall confer regarding electronically stored information. Such request shall be served on each party that has appeared, but it shall not be filed with the court. The conference shall be held as soon as practicable but no later than 30 days from the date of service of the request.

(B) *Conference by agreement of the parties.* At any time more than 90 days after the service of the first responsive pleading, any party may serve on each party that has appeared a request that all parties confer regarding electronically stored information. Such request shall not be filed with the court. If within 30 days after the request all parties do not agree to confer, any party may move that the court conduct a conference pursuant to Rule 16 regarding electronically stored information.

(C) *Purpose of electronically stored information conference among the parties.* The purpose of an electronically stored information conference is for the parties to develop a plan relating to the discovery of electronically stored information. Within 14 days after such conference the parties shall file with the court the plan and a statement concerning any issues upon which the parties cannot agree. At any electronically stored information conference the parties shall discuss:

- (i) any issues relating to preservation of discoverable information;
- (ii) the form in which each type of the information will be produced;
- (iii) what metadata, if any, shall be produced;
- (iv) the time within which the information will be produced;
- (v) the method for asserting or preserving claims of privilege or of protection of trial preparation materials, including whether such claims may be asserted after production;

(vi) the method for asserting or preserving confidential and proprietary status of information either of a party or a person not a party to the proceeding;

(vii) whether allocation among the parties of the expense of production is appropriate, and,

(viii) any other issue related to the discovery of electronically stored information.

(3) *Electronically Stored Information Orders.* The court may enter an order governing the discovery of electronically stored information pursuant to any plan referred to in subparagraph (2)(C), or following a Rule 16 conference, or upon motion of a party or stipulation of the parties, or *sua sponte*, after notice to the parties. Any such order may address:

(A) whether discovery of the information is reasonably likely to be sought in the proceeding;

(B) preservation of the information;

(C) the form in which each type of the information is to be produced;

(D) what metadata, if any, shall be produced;

(E) the time within which the information is to be produced;

(F) the permissible scope of discovery of the information;

(G) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;

(H) the method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;

(I) allocation of the expense of production; and

(J) any other issue relating to the discovery of the information.

(4) *Limitations on Electronically Stored Information Discovery.*

(A) A party may object to the discovery of inaccessible electronically stored information, and any such objection shall specify the reason that such discovery is inaccessible.

(B) On motion to compel or for a protective order relating to the discovery of electronically stored information, a party claiming inaccessibility bears the burden of showing inaccessibility.

(C) The court may order discovery of inaccessible electronically stored information if the party requesting discovery shows that the likely benefit of its receipt outweighs the likely burden of its production, 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.

(D) The court may set conditions for the discovery of inaccessible electronically stored information, including allocation of the expense of discovery.

(E) The court may limit the frequency or extent of electronically stored information discovery, even from an accessible source, in the interests of justice. Factors bearing on this decision include the following:

- (i) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;
- (ii) whether the discovery sought is unreasonably cumulative or duplicative;
- (iii) whether the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or
- (iv) whether the likely burden or expense of the proposed discovery outweighs the likely benefit.

**RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED
INFORMATION, AND TANGIBLE THINGS, OR ENTERING ONTO
LAND, FOR INSPECTION AND OTHER PURPOSES**

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information -- including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations - stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) *Contents of the Request.* 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, and it may specify the form in which electronically stored information is to be produced.

(2) *Responses and Objections.*

(A) *In General.* 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, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) 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.

(B) *Responding to a request for production of electronically stored information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form -- or if no form was specified in the request -- the party shall state the form or forms it intends to use.

(C) *Producing the documents or electronically stored information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

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

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

Rule 37(f)

(f) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions on a party for failing to produce electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

RULE 45. SUBPOENA

Rule 45(b)

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, electronically stored information, or tangible things designated therein. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. 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 cost of producing the books, papers, documents, electronically stored information, or tangible things.

RULE 45. SUBPOENA

Rule 45(f)

(f) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena that requires production of documents shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the demand.

(B) *Form for producing electronically stored information not specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically stored information produced in only one form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible electronically stored information.* The person responding may object to the discovery of inaccessible electronically stored information, and any such objection shall specify the reason that such discovery is inaccessible. On motion to compel or for a protective order, the person claiming inaccessibility bears the burden of showing inaccessibility. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(f)(4)(C) and (D). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material shall make the claim expressly and provide information that will enable the parties to assess the claim. A privilege log need not be prepared.

(B) *Information mistakenly produced.* If information produced in response to a subpoena 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. The provisions of Rule 26(b)(5)(B) and (C) are applicable.

(3) *Further Protection.* Any person subject to a subpoena under this rule may move the court:

(A) for a protective order under rule 26(c) or

(B) to be deemed entitled to any protection set forth in any discovery or procedural order previously entered in the case.