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MEMORANDUM

To: Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Peter G. McCabe, Secretary

From: Steve W. Berman

Date: February 15, 2005

Re: Proposed Amendments to Rules on Electronic Discovery

I. Introduction and Summary

Thank you for the opportunity to provide these comments on the proposed amendments to the federal civil litigation rules on electronic discovery. Our firm concentrates on class action and multi-plaintiff litigation intended to protect the rights of investors, consumers, workers and the environment. Our focus is mainly on representing plaintiffs in securities, investment fraud, product liability, tort, antitrust, consumer fraud, employment, environmental and ERISA cases. We also have represented and continue to represent governmental entities, including in actions against the tobacco and pharmaceutical industries. In numerous actions against the tobacco companies, we were special assistant attorney generals and helped negotiate the nationwide settlement between the States and the tobacco companies. We currently are engaged in among the largest suits against major corporations pending, including serving as lead counsel in the *Pharmaceutical Industry Average Wholesale Price Litigation* and the *Enron Corp. ERISA Litigation.*

Electronically stored information has been and will continue to be critical to our cases, so we are pleased to be able to provide comments on the proposed rules changes. In our comments, we make the following points:

- The Rules Committee's premise for the proposed rules – that electronic discovery is more burdensome, costly, and time-consuming than traditional discovery because of the greater volume of information – is wrong.
- The single most crucial evidence in complex litigation today is in electronic form, and the proposed rules would unwisely restrict its discovery.
- The proposed changes to Rules 26(b)(2) and 37 contradict existing precedent interpreting these rules.
- This precedent already adequately addresses the concerns underlying the proposed changes to Rules 26(b)(2) and 37.

Our comments are premised on the principle that the overarching purpose of discovery is to facilitate the search for facts and shed light upon what really happened. As the Supreme Court stated long ago:

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure .... The new rules ... invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

Hickman v. Taylor, 329 U.S. 495, 500-01 (1947).

II. The Proposed Changes to Rules 26(b)(2) and 37 Should Not Be Adopted

A. The Proposed Rules Are Based On A Faulty Premise

In suggesting the proposed amendments, the Rules Committee has been driven by the premise that e-discovery is "more burdensome, costly, and time-consuming" than traditional discovery because of an "exponentially greater volume" of information. Report of the Civil Rules Advisory Committee ("Report"), p. 2. The Rules Committee states that preserving electronic data may "paralyze" a company's normal operations because it would interfere with routine computer operations. *Id.* at 7-8; *see also* Report, pp. 3, 17.

In addition, this premise is written into the "Committee Note" of two different proposed amendments. These Committee Notes are particularly troubling because, if the amendments were adopted, they would be cited at great length by courts and by parties in their briefs.

Specifically, the proposed Committee Notes state:

- "For example, some information may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes. Time-consuming and costly restoration of the data may be required and it may not be organized in a way that permits searching for information relevant to the action. Some information may be 'legacy' data retained in obsolete systems; such data is

no longer used and may be costly and burdensome to restore and retrieve. Other information may have been deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques, even though technology may provide the capability to retrieve and produce it through extraordinary efforts. Ordinarily such information would not be considered reasonably accessible." Proposed Amendments to the Fed. R. Civ. P. (hereinafter "Proposed Amendments") (attached to Report), p. 11 ("Committee Note" to proposed Fed. R. Civ. P. 26(b)(2)).

- "The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations." Proposed Amendments, p. 18 ("Committee Note" to proposed Fed. R. Civ. P. 23(f)).

As we explain below, this premise is incorrect. Rather than making discovery more difficult, the advent of electronically stored information has made discovery easier and more effective. Further, the constant improvements in electronic records storage and recovery promises only to continue to ease the discovery process. A major flaw of the proposed rules is that they do not fully appreciate these constant improvements, and instead they are based on a static conception of electronic information storage and recovery.

We respectfully submit that there are six fallacies regarding electronic discovery imbedded in the proposed rules that need to be dispelled. We address them below. In addition, we attach a statement by Joan E. Feldman, president of a well-established electronic media consulting firm, who similarly "disagree[s] with the underlying premise in the Report ... that discovery of electronic information is 'more burdensome, costly, and time-consuming' than traditional discovery and that preserving electronic information may 'paralyze' a party's normal computer operations." *See* Attachment A ("Feldman Statement"), p. 1.

1. The rise of computers with word processing, e-mail, and other software programs has not dramatically increased the costs and problems of discovery. The increased volume of information that now exists because of electronic communications has not increased the cost and difficulty of discovery. Rather, because of sophisticated storage and search capabilities, the advent of electronic information has made discovery ***easier***. And these capabilities are constantly improving, and the proposed rules do not adequately account for this reality. A company's electronic information is not a monolith all of which needs to be searched or preserved when the company is sued. Rather, for their own business reasons, companies typically segregate data by the organization creating it – *e.g.*, accounting, manufacturing, sales, etc.[1] Companies should be under an obligation to reasonably consider where relevant electronic

[1] *See also* Feldman Statement, p. 2 ("In my opinion, it is shameful for a responding party to claim that the production of electronic information is too 'burdensome' when such information is often readily accessible with modern technology and when such parties, themselves, have a business need to use this information and to keep it accessible").

information may be maintained and to take steps to preserve it. Search functions in today's software permits this information to be reviewed and evaluated ***more*** efficiently than was true when all information was maintained in paper form.

2. ***Being sued does not require a company to suspend all back-up operations or stop recycling all back-up tapes.*** Similarly, because companies typically segregate their data for their own business purposes, not all back-up and recycling operations need to grind to a halt when a company is sued. *See* Feldman Statement, p. 2 ("With clear identification of the right people, groups, and timing of events, most producing parties can easily preserve relevant electronic data without disrupting their normal business operations. In most instances we work to identify the computers, file and e-mail servers most likely to contain responsive data. Using this information, we can then begin to target the backup media containing files from those data sources. Once identified, the backup media is segregated or pulled from potentially destructive re-use or rotation"). Again, companies should be under an obligation to reasonably consider where relevant electronic information may be maintained and to take steps to preserve it.

3. ***Back-up tapes are not too cumbersome to search.*** Software now exists to permit parties to conveniently review back-up tapes, and this software will only improve in the future. For example, the most widely used back-up software now is a program called Back-Up Exec. This program displays the file structure to the user and enables the user to review the contents of the back-up tape, as is done with active electronic information. The user can select and review files and does not have to examine each one. *See* Feldman Statement, p. 2 ("Most companies today use backup software that is no older than three to four years. As a result, it is much easier today to catalog and select responsive data from backup tapes. This often obviates the need for the expensive and time-consuming wholesale restoration and review of backup tapes.").

4. ***"Legacy" systems do not present a prominent problem anymore.*** Companies today commonly have made the switch to a standardized network platform, using Windows NT that has dramatically reduced the difficulties in accessing "legacy" data. With this standardization comes greater ease in data restoration and fewer problems with "legacy" data. As this trend toward standardization continues, the remaining problems with "legacy" data will become an even rarer exception.

5. ***Data in native format can be produced without great burden or expense.*** Data in native format may be viewed and marked for reference without modifying the files. Software programs, such as Concordance and Summation, exist that permit parties to sort and search native format data. Programs also permit this data to be marked so it can be used by the parties in depositions, motions, and trials.

6. ***Restoring deleted data is not prohibitively expensive.*** Restoring deleted data is not technologically difficult, and it can be done cost-efficiently if approached sensibly. We understand that restoring deleted data currently costs approximately $2,000 per computer. While

restoring deleted data may not be appropriate where hundreds of computers are connected to a network server, it is appropriate where a party has identified a discrete number of executives or employees who are likely to have key information in a case.

In sum, we respectfully submit that the premise in the proposed rules that the advent of electronic information has dramatically increased the cost and burden of discovery is wrong. *See* Feldman Statement, pp. 1-2. In many important ways, electronic storage and search capabilities have eased the burdens and costs of discovery. While we agree that the federal rules should adapt to the realities of the electronic information age, we believe they are flexible enough to do so already, and that courts have interpreted them precisely to achieve this adaptation. The term "electronic information" should not be a bogeyman for excluding swaths of critical evidence from discovery, yet the changes to Rules 26(b)(2) and 37 portend this result. Rather, consistent with current law, companies should be under an obligation to act reasonably to locate and preserve relevant information. The nature of what is reasonable may change with electronic information from what was true for paper information, but the Rules Committee should not preempt courts from making this determination – and from evolving the determination as technology inevitably advances.

B. The Proposed Rules Would Unwisely Restrict the Availability of the Single Most Critical Evidence In Complex Litigation Today

The proposed amendments would do tremendous harm to the fundamental purpose of discovery to enable the parties to search for what really happened, by making it harder to obtain the most important type of evidence available in complex cases. The critical importance of electronic evidence in litigation is underscored in case after case. From the Enron hearings and trials to date, to the Microsoft antitrust trial, the Starr-Clinton impeachment proceedings, and employment discrimination and tort cases, electronically stored documents have proven to be an invaluable, contemporaneous record of the events at issue. This basic characteristic of electronic evidence is reported almost continuously in the news media and reflects the simple fact of conducting business in the digital age – that the majority of written communications are electronic.

Electronic discovery has played a critical role in many of the cases brought by the lawyers at our firm. An instance illustrating that fact, as well as the importance of electronically stored information, occurred in a securities litigation filed by a class of investors, represented by our firm, against the Boeing Company in 1997. After several years of intense discovery, the case settled for $92.5 million.

Plaintiffs alleged that Boeing had misrepresented its commercial airplane production status in the months immediately preceding a sudden $1.6 billion write-down at the conclusion of the third quarter of 1997. Important for purposes of the proposed rules, the e-mail that was produced over Boeing's objections provided an arsenal of evidence that undermined the public

face Boeing had placed on its manufacturing status. These e-mails, like much electronic evidence, were made contemporaneously with the events at issue and thus were tremendously influential.

Nevertheless, even this was not the full story of why electronic evidence was key to plaintiffs' discovery efforts. First, the Company's airplane production data was created and stored electronically. That data could only be discovered through the production of electronic information. Second, Boeing's organizations operated to minimize the retention of paper copies of documents, which again required digital sourcing to reproduce. Third, electronic information was central to understanding Boeing's airplane production organizations and identifying the key personnel involved in them. Finally, electronic documents were required to ferret out the existence of information that was represented to no longer exist. The most important evidence developed by the plaintiffs in the case was composed of electronic evidence.

A second example of our litigation that has been dependent on electronic information is *Wiginton v. CB Richard Ellis, Inc.*, a putative nationwide sexual harassment class action pending in Chicago against a large commercial property brokerage firm. The plaintiffs allege that the defendant has engaged in a pattern and practice of fostering, tolerating, and condoning a company-wide work environment that is hostile, intimidating and degrading to women.

Because the defendant's everyday work atmosphere is in dispute, the preservation and production of e-mails has been a hotly contested issue in the case. Very early on, the plaintiffs discovered that the defendant was not preserving e-mail despite being specifically requested to do so immediately after plaintiffs filed suit. When brought to the court, the Magistrate Judge rejected the defendant's position that "preserving relevant data would be too cost prohibitive." *Wiginton v. CB Richard Ellis*, 2003 U.S. Dist. Lexis 19128 (N.D. Ill. Oct. 24, 2003). The court stated in part:

> As discussed, CBRE did not have the duty to preserve every electronic record, only relevant information. We find not credible CBRE's claims that it would require thousands and thousands of hours to search through electronic data for relevant documents. For example, with respect to e-mails, certainly filters exist to separate spam from non-spam e-mails. And within the remaining non-spam e-mails, CBRE's IT representative testified that the IT department can conduct searches for e-mails containing particular key "sexual" words when requested to do so by the human resources department. They could also search certain file types that are likely to contain images, some of which may be pornographic or sexually explicit. Plaintiff's expert also testified that it is possible to search through e-mails to find sexually explicit terms and images. The fact that such searches might not have turned up all

> sexually explicit e-mails does not excuse CBRE from looking for any e-mails.

Id., at *17-18.

Plaintiffs subsequently moved for costs for electronic discovery (which the court granted and denied in part), requiring the court to consider whether there was sufficient relevant information on defendant's e-mails to order a further restoration of defendant's e-mail back-up tapes. The Magistrate Judge ordered the parties to conduct a "test run" on tapes for three of defendant's offices. In response to four search terms picked by plaintiffs and four by defendant, a preliminary search revealed a multitude of pornographic and sexual e-mail exchanged by CBRE employees, including narrative and photographic accounts of highly pornographic sexual acts. These disturbing images form, in part, the factual underpinnings of the plaintiffs' motion for class certification, for which the parties are currently awaiting a ruling.

C. The Proposed Rules Would Contradict Existing Legal Precedent Regarding Discovery of Electronic Information

We are particularly concerned by the proposed rules because they contradict existing precedent regarding discovery of electronic information. In our view, this precedent is consistent with the fundamental principle underlying discovery enunciated in *Hickman v. Taylor*. Further, as we discuss in section D below, this precedent more than adequately deals with the issues addressed by the proposed rules.

1. The proposed rules would contradict existing precedent requiring a specific demonstration that discovery is "burdensome"

Under proposed Rule 26(b)(2), a producing party would be able to self-designate electronic information as not "reasonably accessible" and, therefore, not discoverable. Proposed Rule 26(b)(2) would provide a producing party with the presumption that electronic documents that are not "reasonably accessible" are too burdensome to produce.

Indeed, proposed Rule 26(b)(2) would discourage producing parties from even looking at electronic data they wish to self-designate as not "reasonably accessible." Proposed Amendments, p. 13 ("The goal is to inform the requesting party that some requested information has not been reviewed or provided on the ground that it is not reasonably accessible.... But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery") ("Committee Note" to proposed Rule 26(b)(2)); Report, p. 11 ("A party need not review....electronically stored information that it identifies as not reasonably accessible"). As a result, the opposing party would have little or no information about the nature, subject matter, or relevance of information that a producing party self-designates as not "reasonably accessible" and, thereby, not discoverable.

Proposed Rule 26(b)(2) would contradict existing precedent requiring a producing party to thoroughly explain why production would be too burdensome based on specific objections rooted in the peculiar nature of that electronic information. As one court stated in rejecting the concept underlying proposed Rule 26(b)(2) and dismissing a producing party's *ipse dixit* that electronic information is too burdensome to produce: "This court will not tolerate these type of objections because not only do they disrespect the judicial process, but such objections thwart discovery's purpose of providing both parties with 'information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement.'" *St. Paul Reinsurance Co. v. Commer. Fin. Corp.*, 198 F.R.D. 508, 511, 512, 514, 517 (D. Iowa 2000). Likewise, another court has ruled:

> A court also can require the parties to identify experts to assist in structuring a search for existing and deleted electronic data and retain such an expert on behalf of the court. But it can do none of these things in a factual vacuum, and *ipse dixit* assertions by counsel that requested discovery of electronic records is overbroad, burdensome or prohibitively expensive provide no help at all to the court.

Thompson v. United States HUD, 219 F.R.D. 93, 99 (D. Md. 2003).[2]

2. The proposed rules would contradict existing precedent by shifting the burden to the requesting party to show entitlement to relevant evidence

Proposed Rule 26(b)(2) would hold that "electronically stored information" that is not "reasonably accessible" (upon the producing party's self-designation) would not have to be produced. Information that is not "reasonably accessible" would include: (i) information stored for "disaster recovery purposes"; (ii) "'legacy' data retained in obsolete systems", and (iii) information "deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques." Proposed Amendment, at p. 11 ("Committee Note" to proposed Rule 26(b)(2)). The requesting party would have to show "good cause" to get such information. Report, pp. 11-12; Proposed Amendments, pp. 6, 11-12, 13, 14. In effect, the burden of showing "good cause" for the production of electronic information would shift to the requesting party.

Under existing law, a producing party must turn over relevant information, and the producing party has the burden of showing that production of evidence – electronic or otherwise

[2] *See also Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 461 (D. Utah 1985).

– would be too burdensome.[3] The courts have ruled that "inaccessibility" of relevant evidence is not a basis for suppressing it. *See Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1383 (7th Cir. 1993) ("Rule 34 contemplates that when data is in an inaccessible form, the party responding to the request for documents must make the data available"). Current law leaves no question as to whether relevant information is discoverable (of course it is), but only as to who should pay for the cost of producing it. *See Zubulake*, 217 F.R.D. at 317; *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 427, 431 (S.D.N.Y. 2002). By contrast, the proposed amendment would ignore the "relevance" of evidence, presume that certain electronic evidence is not discoverable, and encourage producing parties to shift data from "active" to "inactive" status to gain the presumption that such information is not "reasonably accessible."

In addition, proposed Rule 26(b)(2) would say that data "deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques" (Proposed Amendment, p. 11) ("Committee Note" to proposed Rule 26(b)(2)) is not "reasonably accessible" and would not have to be produced, absent a showing of "good cause" by the requesting party. This aspect of proposed Rule 26(b)(2) would contradict legal precedent that relevant but deleted electronic information should be produced. *See Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) ("it is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable").[4]

Even though changing technology makes all types of electronic information more and more accessible, producing parties would cite the proposed amendments as an excuse for not producing information that is becoming increasingly easy to access, retrieve, search, and produce. Hence, the proposed amendments would allow producing parties to benefit from a presumption that certain electronic information is not discoverable long after it has become easily accessible.

3. Proposed Rule 37(f) would contradict existing precedent imposing a duty to preserve relevant evidence

Proposed Rule 37(f) would provide a "safe harbor" to a party that loses electronic information as the result of "routine operation of the party's electronic information system." Proposed Amendments, p. 32 (proposed Rule 37(f)). Specifically, proposed Rule 37(f) would not allow a court to impose sanctions for document destruction if: "(1) the party took reasonable steps to preserve the information after it knew or should have known the information was

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[3] *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003); *Black & Veatch Int'l Co. v. Foster Wheeler Energy Corp.*, 2002 U.S. Dist. Lexis 9685 (D. Kan. May 2, 2002); *St. Paul Reinsurance Co., Ltd. v. Commer. Fin. Corp.*, 198 F.R.D. at 511-12.

[4] *See also Thompson*, 219 F.R.D. at 97; *Rowe Entm't*, 205 F.R.D. at 427, 431; *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001); *Kleiner v. Burns*, 2000 U.S. Dist. Lexis 21850, at *10-13 (D. Kan. 2000); *Simon Prop. Group L.P. v. MySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000); *Zhou v. Pittsburgh State Univ.*, 2003 U.S. Dist. Lexis 6398, at *5-6 (D. Kan. Feb. 5, 2003).

discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system." *Id.*

However, to make full sense of the impact of this proposed amendment, proposed Rule 37(f) must be read in relation to proposed Rule 26(b)(2). When so read, it becomes clear that under the proposed rules sanctions may only be imposed when a party destroys ***reasonably accessible*** relevant electronic information. Thus, parties would generally be free to destroy in a routine operation without fear of sanction electronic information that they know is relevant to pending litigation if they deem it not reasonably accessible. The Committee Note to proposed Rule 37(f) makes this clear:

> The reasonableness [as specified in proposed Rule 37(f)(1)] of the steps taken to preserve electronically stored information must be measured in at least three dimensions. The outer limit is set by the Rule 26(b)(1) scope of discovery. A second limit is set by the new Rule 26(b)(2) provision that electronically stored information not reasonably accessible must be provided only on court order for good cause. In most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order.

Proposed Amendments to the Fed. R. Civ. P. ("Proposed Amendments"), p. 34 ("Committee Note" to proposed Fed. R. Civ. P. 37(f)). A producing party would be able to (1) self-designate electronic information as not "reasonably accessible" (per Rule 26(b)(2)) and, therefore, not discoverable, (2) destroy the electronic information in a "routine operation" (per Rule 37(f)(2)), and (3) claim a "safe harbor" from sanctions under proposed Rule 37(f).

Put another way, the Committee Note to proposed Rule 37(f) says that a producing party "acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order." The only electronic information that would be "discoverable without court order" would be "reasonably accessible information." By contrast, backup tapes, legacy data, and other electronic information that a producing party self-designates as ***not*** "reasonably accessible" would be discoverable only upon a court order after the requesting party has shown "good cause." Proposed Amendments, p. 6 (proposed Rule 26(b)(2); *id.* at 11-14 (Committee Note to proposed Rule 26(b)(2)). In practice, a producing party would be able to destroy electronic information, per "routine operation," that is relevant to parties' claims and defenses — even after receiving notice of litigation — as long as they designate that information as not "reasonably accessible." The proposed amendments and Committee Notes pay no heed to the relevance of the information to be destroyed.

Proposed Rule 37(f) would contradict legal precedent requiring the preservation of all "relevant" evidence — including electronic information — when the producing party has notice

(*i.e.*, through the filing of a complaint) or should have known that the evidence may be important to future litigation. As one court has stated:

> This duty of disclosure would be a dead letter if a party could avoid the duty by the simple expedient of failing to preserve documents that it does not wish to produce. Therefore, fundamental to the duty of production of information is the threshold duty to preserve documents and other information that may be relevant in a case.[5]

4. The proposed rules would contradict existing precedent allowing sanctions for negligent destruction of relevant electronic information

The Rules Committee is considering requiring a higher showing of mental culpability — *i.e.*, intention or reckless disregard — for the imposition of sanctions for the spoliation of electronic information through the "routine operation of the party's electronic information system." Proposed Amendments, p. 33 footnote ("Committee Note to proposed Rule 37(f)). This rule would, effectively, allow a party to act with negligence to destroy or alter electronic information through the "routine operation" of an information system. No sanctions would be available in such a case. In other words, a party's negligent failure to stop the "routine operation" of a system which recycles back-up tapes or purges computers of electronic information would not be subject to any sanctions — even if the lost information was "relevant" to the dispute.

Legal precedent allows courts to impose sanctions for ordinary negligence without any showing of willfulness, intent, or reckless disregard.[6] This proposed change to the mental culpability requirement would overturn these cases, including *Danis,* 2000 U.S. Dist. Lexis 16900, at *113-18, *157-58 in which the court sanctioned a lawyer with a monetary fine of $10,000 for his negligence in, *inter alia*, failing to stop the "routine operation" of a system that destroyed electronic information pertaining to terminated employees. In addition, proposed Rule 37(f) would restrict the inherent power of courts to issue sanctions. *See, e.g., Silvestri,* 271 F.3d at 590 ("[t]he policy underlying this inherent power of the courts [to sanction for spoliation] is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth").

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[5] *Danis v. USN Communs., Inc.,* 2000 U.S. Dist. Lexis 16900, at *4-5 (N.D. Ill. 2000); *see also Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *Silvestri v. GMC*, 271 F.3d 583, 591 (4th Cir. 2001); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); *In re Cheyenne Software, Inc.*, 1997 U.S. Dist. Lexis 24141 (E.D.N.Y. Aug. 18, 1997).

[6] *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 212 (1958); *Marrocco v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

C. Existing Precedent Adequately Addresses The Changes Sought By The Proposed Rules

Courts have already implemented a number of measures to deal with electronic information, including restrictions on electronic discovery, cost shifting, and sampling. Courts' existing responses to the challenges of electronic discovery, combined with their flexible powers to adapt new responses, are more than adequate to address the concerns that the proposed rules attempt to address.

1. Parties are already protected against the production of electronic information that is truly not accessible

Producing parties do not need the presumption, under proposed Rule 26(b)(2), that electronic information is exempt from production if it is not reasonably accessible. Under existing legal precedent, parties are already protected from the burdens and costs of producing information when it would be unduly burdensome. *Xpedior Creditor Trust v. Credit Suisse First Boston, (USA), Inc.*, 309 F. Supp. 2d 459, 461 (S.D.N.Y. 2003) ("Thus, as a general matter, all potentially relevant material is discoverable. The court may, however, limit or condition discovery where a request imposes an 'undue burden or expense' on the responding party").

The Committee Note to proposed Rule 26(b)(2) lists numerous factors that courts should consider when evaluating good cause to order the production of electronic information that is not reasonably accessible. Proposed Amendments, p. 14 ("Committee Note" to proposed Rule 26(b)(2)). The Note states that "[e]xamples include sampling electronically stored information to gauge the likelihood that relevant information will be obtained, the importance of that information, and the burdens and costs of production; limits on the amount of information to be produced; and provisions regarding the cost of production." *Id.* It provides that "[t]he good-cause analysis would balance the requesting party's need for the information and the burden on the responding party." *Id.*

However, courts already perform this balance when evaluating the reasonableness of discovery under existing Rule 26(b)(2). Further, the factors identified in the Note are all already considered by the courts. The eight-factor and seven-factor tests, respectively, in *Rowe* and *Zubulake*, already consider factors cited in the "Committee Note" such as (i) the importance of the information to the litigation, (ii) the burdens and costs of production, and (iii) the likelihood of discovering important information. *See Rowe Entm't,* 205 F.R.D. at 428; *Zubulake,* 217 F.R.D. at 321-22. The proposed "Committee Note" recognizes the role played by existing case law: "The proper application of those principles can be developed through judicial decisions in specific situations. Caselaw has already begun to develop principles for making such determinations." Proposed Amendments, p. 14 (citing *Zubulake, Rowe Entertainment, McPeek*). However, the "Committee Note" offers no explanation as to why existing case law must be codified through the proposed amendments.

In short, existing precedent already achieves what the proposed rules seek. As one court stated:

> [I]t also can be argued with some force that the Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records. Rule 26(b)(2) requires a court, *sua sponte*, to evaluate the costs and benefits associated with a potentially burdensome discovery request... Under Rules 26(b)(2) and 26(c), a court is provided abundant resources to tailor discovery requests to avoid unfair burden or expense and yet assure fair disclosure of important information. The options available are limited only by the court's own imagination and the quality and quantity of the factual information provided by the parties to be used by the court in evaluating the Rule 26(b)(2) factors. The court can, for example, shift the cost, in whole or part, of burdensome and expensive *Rule 34* discovery to the requesting party; it can limit the number of hours required by the producing party to search for electronic records; or it can restrict the sources that must be checked. It can delay production of electronic records in response to a *Rule 34* request until after the deposition of information and technology personnel of the producing party, who can testify in detail as to the systems in place, as well as to the storage and retention of electronic records, enabling more focused and less costly discovery. A court also can require the parties to identify experts to assist in structuring a search for existing and deleted electronic data and retain such an expert on behalf of the court.

Thompson, 219 F.R.D. at 98-99.

2. Parties are already protected from the costs of electronic discovery by cost-shifting rules

The Committee Note to proposed Rule 26(b)(2) states that courts may make orders "regarding the cost of production." Proposed Amendments, p. 14 (Committee Note). But courts already have the ability to shift costs so that a producing party is not left alone with the burden of electronic information that is either too voluminous or too difficult to produce without great expense.[7]

[7] *See, e.g., Thompson*, 219 F.R.D. at 99; *Multitechnology Servs. L.P. v. Verizon*, 2004 U.S. Dist. Lexis 12957 (N.D. Tex. July 12, 2004); *Rowe Entm't*, 205 F.R.D. at 428; *Byers v. Ill. State Police*, 2002 U.S. Dist. Lexis 9861 (N.D. Ill. June 3, 2002); *McPeek*, 202 F.R.D. at 34; *Zubulake*, 217 F.R.D. at 321-22.

Since the case law on cost-shifting is fairly uniform, and differs only in minor respects, there is no need to set a uniform national standard through the proposed amendments. The "marginal utility" test of the *McPeek* opinion, for example, also appears in *Rowe Entertainment* (205 F.R.D. at 430 (quoting *McPeek*)) and in *Zubulake* (217 F.R.D. at 322 (considering "[t]he relative benefits to the parties of obtaining the information")). Indeed, case law seems more complete and helpful than the proposed amendments because the former lists additional factors for a court to consider such as the relative ability of each party to control costs and its incentive to do so,[8] the relative benefits to the parties of obtaining the information,[9] and the purpose for which the responding party maintains the requested data.[10]

3. Courts already use sampling to allow parties to look at small portions of electronic information in order to assess relevance

The Rules Committee notes that courts may use sampling as one measure to deal with voluminous amounts of electronic information:

> The rule recognizes that, as with any discovery, the court may impose appropriate terms and conditions. Examples include sampling electronically stored information to gauge the likelihood that relevant information will be obtained.

Proposed Amendments, p. 14 ("Committee Note" to proposed Rule 26(b)(2)). Yet, courts already utilize sampling by permitting parties to review a small portion of electronic information, rather than a whole array, to determine relevance before moving forward with further electronic discovery.[11]

SWB:j

Attachments

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[8] *Rowe*, 205 F.R.D. 421.

[9] *McPeek*, 202 F.R.D. at 34; *Zubulake*, 216 F.R.D. at 284.

[10] *Zubulake*, 216 F.R.D. at 284.

[11] *See Thompson*, 219 F.R.D. at 97; *Zubulake*, 217 F.R.D. at 324; *McPeek*, 202 F.R.D. at 34; *Wiginton v. CB Richard Ellis, Inc.*, 2004 U.S. Dist. Lexis 15722, at *16 (N.D. Ill. 2004).

Attachment A

Statement from Joan E. Feldman, President
Computer Forensics, Inc.™

I am the founder and President of Computer Forensics Inc.™ Computer Forensics Inc.™ provides consulting and expert services in the areas of electronic media discovery, electronic risk control, and related topics to a variety of clients, including Fortune 500 corporations, public agencies, courts, parties to lawsuits, law firms, and bar associations.

Prior to founding Computer Forensics Inc.™ in 1994, I was a forensic specialist and litigation and records management consultant. I have over 25 years of experience in computer forensics, complex litigation, database design, and system administration.

I have served as a consultant or expert with regard to electronic media discovery, electronic risk, and related topics since 1992 and have worked with hundreds of clients on electronic discovery issues. In addition, I have also been appointed by courts to act as a neutral intermediary on these topics. I have assisted the courts and involved parties to reach workable resolutions concerning the requesting party's entitlement to discovery and the responding party's claims of "burden".

In my work, I also advise companies on the development of email communication, data retention, and privacy policies for electronic records. In addition, I frequently conduct in-house continuing legal education seminars on electronic discovery compliance issues for the legal departments of large corporations. I am frequently asked to speak to audiences across the country on these topics. I also write on these and related topics for national publications and am the author of *The Essentials of Electronic Discovery: Finding and Using Cyber Evidence,* published by Glasser LegalWorks, 2003.

Because of my experience in this field, I would disagree with the underlying premise in the Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and the Proposed Amendments to Fed. R. Civ. P. that discovery of electronic information is "more burdensome, costly, and time-consuming" than traditional discovery and that preserving electronic information may "paralyze" a party's normal computer operations. Report of the Civil Rules Advisory Committee ("Report"), pp. 2, 7-8.[1]

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[1] See also Report, p. 3 ("The distinctive features of electronic discovery often increase the expense and burden of discovery"); Report, pp. 7-8 ("[T]he 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. Suspension of all or a significant part of that activity could paralyze a party's operations"); Report, p. 17 ("There is great uncertainty as to whether and when a party may continue some or all of the routine recycling or overwriting functions of its computer system without risk of sanctions. Suspension of such operations can be prohibitively expensive and burdensome and can result in the accumulation of duplicative and irrelevant data that must be reviewed and produced, making discovery more expensive and time-consuming"); Proposed Amendments to the Fed. R. Civ. P. ("Proposed Amendments") (attached to "Report"), p. 11 ("For

At Computer Forensics Inc.™, we have worked very carefully over the past 11 years to make sure that the right data is preserved in discovery. In the very early years of electronic discovery, there may have been occasions where draconian measures were taken to preserve data. However, in more recent years, we have not found that a party's normal computer operations must be "paralyzed" by the discovery process.

Qualified experts and consultants, armed with knowledge of enterprise-wide technology and computer forensic skills, can help attorneys and companies navigate their data collections to accurately identify responsive data sets. With clear identification of the right people, groups, and timing of events, most producing parties can easily preserve relevant electronic data without disrupting their normal business operations.

In most instances we work to identify the computers, file and e-mail servers most likely to contain responsive data. Using this information, we can then begin to target the backup media containing files from those data sources. Once identified, the backup media is segregated or pulled from potentially destructive re-use or rotation.

It is true that some backup tapes created prior to 1998 can be difficult to catalog, but today's backup software technology allows us easier access to the tapes' contents. Most companies today use backup software that is no older than three to four years. As a result, it is much easier today to catalog and select responsive data from backup tapes. This often obviates the need for the expensive and time-consuming wholesale restoration and review of backup tapes.

Because Computer Forensics Inc.™ works for both requesting and responding parties; we have had an opportunity to see both sides of the issue regarding the burdens of electronic discovery.

In my opinion, it is shameful for a responding party to claim that the production of electronic information is too "burdensome" when such information is often readily accessible with modern technology and when such parties, themselves, have a business need to use this information and to keep it accessible. Conversely, I have little patience with requesting parties who may make assumptions that the process can be done "with a flick of the switch". The truth lies in the middle ground, and again, is best based upon knowledge of what systems are in place in a particular enterprise.

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example, some information may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes. Time-consuming and costly restoration of the data may be required and it may not be organized in a way that permits searching for information relevant to the action. Some information may be 'legacy' data retained in obsolete systems; such data is no longer used and may be costly and burdensome to restore and retrieve. Other information may have been deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques, even though technology may provide the capability to retrieve and produce it through extraordinary efforts. Ordinarily such information would not be considered reasonably accessible"); Proposed Amendments, p. 18 ("The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations").

It should also be noted that while today's arguments may focus on the issue of preserving and restoring backup media, most relevant information sought through discovery is, in actuality, active and online data. This is the current and growing trend. It is easy to get distracted by backup tape issues, and to overlook the fact that most of the information sought is already present on the active systems. The biggest challenge ahead of us is dealing with the sheer volume of active data

I believe that an early meet-and-confer session where valuable, specific information regarding the producing party's software and hardware system is divulged is the best solution to clearing electronic discovery's "fogs of war". Full disclosure, reasonable requests for targeted data, and willingness to compromise are the best tools available to attorneys in dealing with these issues.

Joan E. Feldman

February 11, 2005
Date

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