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Subject Comments on FRCP 26(b)(2) Attached

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Comment on [Proposed] Amendments to
Federal Rule of Civil Procedure 26(b)(2)

1) Removing Embedded Error from the Decision Model:

> "***The sheer volume of such data, when compared with conventional paper documentation*** can be staggering. A floppy disk … 1.4 MB …. A CD-ROM, with 650 MB …. One gigabyte is the equivalent of 500,000 typewritten pages. … Backup data measured in terabytes, or 1,000,000 MB."

Manual for Complex Litigation, Fourth, section 11.446 (emphasis added).

At first blush, "the sheer volume of such data" certainly seems intimidating. But the implied premise is deeply flawed. This comparison to conventional paper documentation, especially sheer volume, is misleading. Such a comparison embeds the erroneous assumption that electronically searching one gigabyte of electronic text is a task of the same magnitude as manually searching 500,000 pages of paper text. This ignores the advances in index and text search utilities that now render the sheer volume of electronic data mostly irrelevant.

Electronic searches are much faster than any manual search, whether one typewritten page or one billion. Imagine these two simple tests:

> 1) After spell-checking a document on your computer, run the spell-checker a second time. The application will return a "Spell Check Complete" response within a fraction of a second, even though it has performed the full search function.
>
> > a) Plant a misspelled word in the document, and the spell-checker will again locate that word in a fraction of a second.
>
> 2) Open the "Find" function in a large document, and search for a word you know is not in the text. The resulting "Not Found" message arrives in a fraction of a second.
>
> > a) Now search for a word that you know appears only at the end of the text. The application locates the word in virtually the same amount of time, even if it resides 250 pages deep in the document.

Comparing gigabytes of electronic text to paper text is a false analogy. "Volume of data" and "time to search" are artifacts from the previous paradigm that do not map over the new substrate of electronic information. Volume *per se* has been rendered

irrelevant by electronic search capabilities. Indeed, volume and time to search are now the least important metrics for properly analyzing electronic discovery. These misleading metrics must be *rejected out of hand* as analytic bases from which to discuss or think about the discovery of electronic information.

2) "Catch 26"

> A party need not provide discovery of electronically stored information that the party identified as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

Committee's Proposed Amendment to FRCP 26(b)(2).

This new rule would cleave the set of discoverable information, understood consistently for decades, and simply discard information from that set. The rule as amended now defines now two subsets of the primary set:

1. "accessible" and, as before, within the definition of discoverable;
2. "not reasonably accessible" and now not discoverable, by definition.

Subset two results in nothing less drastic than a switch in polarity. The new rule permits the excision from membership in the primary set of a certain category of relevant, non-privileged information within the custody or control of a party. More to the point, the metric used to accomplish this carve-out -- the very party asked to produce the information is permitted to declare the information not discoverable, by dint of an assertion of inaccessibility. And this is done based on a criterion utterly unrelated to the information itself -- the storage medium chosen for storage of such information.

As rule repair in a system, this amendment fails. It fails structurally because it places the fix in the wrong place in the system. Information is, and should continue to be, either discoverable or not discoverable based on its content analyzed in the context of the case. Information either is or is not within the scope of the relevant issues at bar. Information either is or is not reasonably calculated to lead to admissible evidence. But with this amendment, information that may well be case dispositive can be made to lay

entirely and permanently outside the scope of discovery solely because of the storage medium the producing party elected to use. This is a wrong result *prima facie*.

As applied, the result will be even worse. Parties that routinely seek to avoid discovery will structure their document retention and legacy data policies such that select information will be routinely swept onto remote, encrypted, compressed, arcane and controlled-access storage media, perhaps labeled "Disaster Recovery," or "Legacy Data." The goal – to forever and always be in a position to declare said information "not reasonably accessible" in the event an opposing litigant seeks production.

The Committee proposes its "second tier," a shifting of the burden, as a safeguard. It is not a safeguard in any sense. Yes, the amendment states that an order to produce will issue upon "a showing of good cause by the requesting party."

But that burden is too great, in this context. The requesting party will have precisely zero information, at two levels, with which to make a good cause showing. At the higher level, the burdened party will have no information about the opponent's document retention policies, disaster recovery plans, definitions of legacy data, the hardware, software and media. At the detail level, the burdened party will have no information about the data that resides on the ostensibly inaccessible media. It will have no information about its content, its substantive or temporal scope, its authors, recipients, or detail. Having self-declared the information to be non-discoverable, the objecting party will quite neatly deny that any macro-information can be provided due to the inaccessibility of the micro-information. Welcome to the "Catch 26" of Federal discovery.

At best, the new rule sets the stage for a thrilling meta-litigation searching for clear and reliable answers to the questions implied by the categorical lists above. This will include dueling experts opining on the "reasonableness" of "accessibility" of "information." The Court will become the finder of fact. Whither the effects of meta-appeals.

These events will bias litigation in favor of the responding party. Contrary to the fundamental mandate of Rule 1, the amended rule would:

1. make litigation far more burdensome, unpleasant and time consuming for the parties and courts;
2. make litigation far more expensive, if not impossible, for the requesting Party;
3. further reward recalcitrant parties – above and beyond the extant rewards of delay and recalcitrance already tolerated at the trial level;
4. strongly incent parties to restructure document retention policies to render far more electronic data "not reasonably accessible;"
5. result in a powerful disincentive for good faith litigants to even try to knock down this new barrier to discovery, architected by a new definition of discovery and constructed by wealthy parties.

This is not to say that the issue of truly inaccessible information must not be dealt with, and fairly. Below we address this narrower issue and propose a straightforward solution.

Conclusion: Subparts (i), (ii) and (iii) of the current Rule still work, and can be improved with Committee Note guidance on this issue. The extreme step proposed here – defining as not discoverable *relevant information that exists within the control of a party* -- is not the appropriate repair for the problem at hand. It is the pathway to pernicious injustice.

3) Simpler Rule Repair:

Consider this hypothetical: Company R requests Company O produce information that happens to reside somewhere on an archive comprised of about three hundred backup tapes. Company O would like to declare these tapes "not reasonably accessible." Assume that a rule that requires Company O to then elect one of two options: (i) produce the physical media to R's experts who will attempt to demonstrate accessibility at R's expense; or (ii) deliver the media to an agreed or court-appointed neutral expert who will conduct the same task, cost allocation to be determined by the Court subsequently. If any information is accessed, Company O shall then take custody, review, produce or object as the rules otherwise require. Such a rule would reduce the incentive for a responding party to declare its information "not reasonably accessible."[1] Notably, if that information is truly inaccessible, either option should be equally palatable to the responding party.

[1] Proposed language for amended FRCP 26(b)(2): "A responding party may show, by competent declaration with applicable documentation, that requested information is not reasonably accessible. The requesting party may then request by *ex parte* application that the Court order the responding party to

It bears mention here that information stored on archival systems, backup tapes or other storage system nonetheless still resides on some fixed medium, however dated it may be. Any rational archive, disaster recovery or legacy data plan would implement media with long shelf lives and compatible technology to recover the stored data. In short, any rational company that uses resources to archive information for disaster recovery is going to retain and maintain the technology to recover that information.

Simply put, electronic data either is, or is not, accessible. It is only a question of desire. If the data were being sought by the CEO of Company O, instead of opposing counsel, most assuredly there would be no "reasonably inaccessible" excuses asserted. If storage media have been damaged, or hardware or software malfunctions, then perhaps the information is in fact not accessible.[2] If the responding party is confident that its data is truly inaccessible, then there is no basis to object to producing the media.

Conclusion: The proposed "reasonably accessible" concept is likely to produce far more expense and mischief than efficacy or truth.

Respectfully submitted,

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produce the media on which the requested, inaccessible information resides either to (i) an expert hired by the requesting party or (ii) to an expert agreed to by the parties or appointed by the Court. The examining expert shall produce a report to the Court stating the accessibility of information on said media. The court shall then specify terms and conditions of production as appropriate, including cost apportionment for this process."

[2] On closer analysis, the very notion of "not reasonably accessible" information may simply be illusory. Assume that a responding party has one terabyte of information. Whether stored as atoms or bits, each discrete subset of information is either discoverable or not discoverable under the current rules, based on content and context. If the information is on paper, even if stored in a secure underground warehouse in Nevada for disaster recovery purposes, it would still be "reasonably" accessible. Information stored digitally, whether magnetic or electronic, is actually more likely to be accessible than any other method. Coupled with the power of search software on electronic data it is hard to imagine any scenario wherein electronic data could plausibly be deemed "inaccessible," *absent demonstrable destruction of the magnetic or electronic medium.* It should be understood that the likelihood of obsolete hardware and software systems being no longer in existence is unpersuasive. The Computer Museum History Center in Mountain View California maintains the world's largest archive of obsolete hardware, software and devices available for reasonably priced rental.