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February 15, 2005

*Via Facsimile*

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, D.C. 20544

**Re: Proposed Amendments to Federal Rules on Electronic Discovery**

Dear Mr. McCabe:

I am a partner with the Lexington Law Group, LLP ("LLG"), which is a San Francisco-based law firm specializing in environmental and consumer litigation on behalf of nonprofit environmental organizations, public entities and individuals. I and the other attorneys at LLG have extensive experience with the discovery of electronic information. Thus, I am writing to comment on the proposed amendments to Federal Discovery Rules 16(b), 26(b) and (f), 37(f) and Form 35.

LLG encourages the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Committee") to adopt the proposed changes to Rules 16(b), 26(f) and Form 35 which, collectively, create a structure for parties and the court to give attention to issues pertaining to the discovery of electronic information at the outset of litigation. The proposed amendment to Rule 26(f) is particularly beneficial in that it directs the parties and the court to address at the initial discovery conference: (1) the sources where electronic information is stored on parties' computer systems and the extent to which information must be retrieved from such sources (for example, whether parties should search through information stored solely for disaster recovery, stored on obsolete systems or that would require forensic techniques to retrieve); (2) the accessibility of electronic information in relation to the parties' computer systems and the cost to retrieve and review the information sought; and (3) the unique issues pertaining to the preservation of electronically stored information. In fact, requiring the parties and the court to address these issues at the initial discovery conference is a more efficient manner of resolving electronic discovery issues than the manner proposed in the amendments to Rules 26(b)(2) and 37(f), as discussed below.

Mr. Peter G. McCabe  
February 15, 2005

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The proposed change to Rule 26(b)(2) states that a party need not provide discovery of electronically stored information that is not reasonably accessible, unless the court orders discovery for good cause. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. This proposed change creates an additional and cumbersome step in the discovery process when accessibility issues can be more efficiently addressed during the initial discovery conference, as proposed in the amendment to Rule 26(f). Furthermore, the issue of accessibility of information can already be addressed under the current discovery rules through the burden objection, the meet and confer process and, ultimately, through a motion to compel. Lastly, the proposed Rule creates an exemption from the production of electronic information when no such equivalent exemption exists for paper discovery, even though paper discovery is often more burdensome to access.

The proposed change to Rule 37(f) is also problematic. If adopted, Rule 37(f) would provide a safe harbor for a party who is unable to produce discoverable electronic information because that information was destroyed as a result of the routine operation of a party's electronic information system. First, proposed Rule 37(f) would allow parties to bypass their obligation to implement a litigation hold on all reasonably discoverable information. Second, as proposed under the amendment to Rule 26(f), preservation of electronic information should be addressed at the initial discovery conference so that the extent to which a responding party must cease the normal operations of its computer systems may be clarified. Third, the proposed change to Rule 37(f) is insufficient because, as noted by the Committee, the Rule provides protection for conduct unlikely to be sanctionable under the current rules. Finally, the proposed rule change would encourage parties to use electronic information systems that destroy information in short intervals.

For reasons addressed above, LLG encourages the Committee to adopt the proposed changes to Rules 16(b), 26(f) and Form 35, so that parties and the court are directed to address important electronic discovery issues at the outset of litigation. LLG further encourages the Committee *not* to adopt the changes proposed for Rules 26(b)(2) and 37(f), as the solutions sought are already provided for by the discussions during initial discovery conference and the current discovery rules.

Yours very truly,



Eric S. Somers, Esq.