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Professor Arthur R. Miller
Harvard Law School
Areeda Hall 225
Cambridge, MA 02138
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Via e-mail: (Rules_Comments@ao.uscourts.gov) and
Express Mail to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Dear Mr. McCabe:

I welcome the opportunity to respond to the request for comments regarding the proposed amendments to the Federal Rules of Civil Procedure concerning discovery of electronically stored information. Let me first congratulate the Advisory Committee and my colleagues and friends Ed Cooper and Rick Marcus on a comprehensive and well integrated package of amendments that seems to me to cover a number of necessary and difficult subjects. The proposals overall are well thought out and sensible.

I am not deeply versed in the intricacies of "e-discovery," but a recent professional engagement and extended consultations with lawyers deeply immersed in the subject have confirmed my view that the discovery Rules should be amended to establish national standards on certain matters and to supply much needed guidance for the bench and bar in this complex and demanding area of practice that is still a mystery to (or not even within the consciousness of) many judges and lawyers.

The proposed amendments to Rule 26(b), 26(f), and 37(f) seem to me to be grounded in precedent. I was quite pleased to note that the proposed amendment to Rule 26(b)(2) carries forward to today's electronic world the concepts of

proportionality, balance, and common sense embedded in the 1983 amendment to Rule 26(b). As is said in the treatise I co-author, "Rule 26(b) was amended in 1983 to promote judicial limitation of the amount of discovery on a case-by-case basis to avoid abuse or overuse of discovery through the concept of proportionality." 8 Federal Practice & Procedure: Civil 2d § 2008.1. As the Reporter to the Advisory Committee on Civil Rules at the time, it was and is my view that the amendment to Rule 26(b) marked a philosophical readjustment of the uncabined liberality formerly accorded opportunities for discovery. Indeed, at a contemporaneous Federal Judicial Center seminar for district judges, I remarked:

> "Until last August, the last sentence in Rule 26 (a) said: 'Unless the court says otherwise, go ye forth and discover.' That had been the message of the last sentence of rule 26(a). In 1983, we decided it was a lousy message. That sentence has been stricken and replaced, quite literally, by the reverse message, which you now find in rule 26(b). Rule 26 (b) now says that the frequency and extent of use of discovery shall be limited by the court if certain conditions become manifest. Just realize the 180 degree shift between the last sentence of the old rule 26 (a) and the new sentence. Judges now have the obligation to limit discovery if certain things become manifest. The things that are then listed in that paragraph are basically the evils of redundancy and disproportionality." Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility*, 1984, pp.32-33, cited in 8 Federal Practice & Procedure: Civil 2d § 2008.1, fn. 3.

In 1993, the Rule was further amended "to enable the court to keep tighter rein on the extent of discovery" and to invest district court judges with the express right to place limits on depositions, interrogatories, and requests for the production of documents. At that time, the Advisory Committee observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument of delay and oppression." Note to the 1993 Amendments of F.R.C.P. 26(b).

Although the 1983 and 1993 amendments do not appear to have brought about the radical shift in practice I foresaw in the passage quoted above, in 1998 the Supreme Court noted the importance of the proportionality concept by observing that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." *Crawford-El v. Britton,* 523 U.S. 574, 598 (1998) (Stevens, J.).

Then, the 2000 discovery amendments sent another signal of the "need for active judicial use of subdivision (b)(2) to control excessive discovery." Advisory Committee Note to the 2000 Amendments to Rule 26(b), 192 F.R.D. at 390. Even more important for present purposes, the 2000 amendment adopted a nationwide "two-tier architecture" for discovery that narrowed the scope of attorney managed discovery to resemble a proposal published in 1978. 8 Federal Practice & Procedure: Civil 2d § 2008.1 at fn. 1 (pocket part). And, although the thought was not adopted specifically as part of the 2000 amendment package, my Treatise does observe that: "One method for regulating discovery requests that infringe on the limitations of Rule 26(b)(2) is to condition orders that such discovery go forward on the payment by the party seeking discovery of part or all of the resulting expenses incurred by the responding party." 8 Federal Practice & Procedure: Civil 2d § 2008.1 at fn. 16 (pocket part).

I rehearse all this history to emphasize my view that the Committee is on appropriate ground in offering amendments to the rules to address the unique problems of today's e-discovery by honoring the trend toward focused discovery that is proportional to the needs of the particular case. The objective, of course, is to promote discovery that is more efficient, less costly, and less burdensome but meets the needs of the particular case.

It seems to me that much of the burden and expense currently associated with electronic discovery concerns the perceived duty of litigants to preserve virtually all electronically stored information containing information that might be relevant to the subject matter of what often are extremely complex cases involving the conduct of people and entities over a number of years. That obligation cannot be applied without regard to the cost and burden of preserving such data or the quantum of benefit that will result from ultimate production. Such a result is unrealistic, ignores the context and the often unique circumstances of individual cases, and would be contrary to the trends in the discovery rules, at least since 1983, as described above.

Therefore, I recognize the need for an amendment that protects a party from sanctions under Rule 37 for failing to produce electronically stored information lost in the normal and good faith operation of computer systems. Conversely, however, conduct that is designed to undermine the discovery process or willfully violates a court order requiring preservation of specified information cannot be condoned or left unreproached.

Discovery of electronic information poses many of the problems presented in the earlier "hard copy era" and addressed in the amendments of the past twenty years. Indeed, some of these problems are magnified because of the present, let alone the future, scale of electronic data practices and their centrality to the search for truth our civil justice system undertakes. Thus, it is most appropriate that the Committee shape the discovery rules to fit the present realities and to focus the profession's attention on e-discovery and the proper etiquette regarding it.

But a note of caution. The amendments must be drawn in an even-handed and sufficiently flexible form to accommodate future developments, the lessons of experience, and the basic objectives of the discovery process. There is a considerable amount of experimentation and protocol writing going on among lawyers and judges of good faith. That case-by-case experimentation, from which, I suspect, much can be learned, should not be inhibited by provisions written today that may prove premature, or have an ossifying effect, or work at cross-purposes with what may turn out to be "best practices" when tested in the crucible of real cases. In most respects the present proposals should achieve their objective when applied by judges who take account of the circumstances of the particular cases before them. Moreover, I am confident that the Committee is aware of the fact that in this context, "one size does not fit all" and will sensitively refine its proposals where necessary to meet the challenges of this enormously growing, dynamic, and critical phenomenon.

I applaud the Committee for its diligence and work product and hope that my comments regarding the proposed rules will be of some help.

Very truly yours,

Arthur R. Miller
Bruce Bromley Professor of Law
Harvard Law School

CC: Hon. David F. Levi (dlevi@caed.uscourts.gov)
Hon. Lee H. Rosenthal (lee_rosenthal@txs.uscourts.gov)
Hon. Peter G. McCabe (peter_mccabe@ao.uscourts.gov)
Prof. Edward H. Cooper (coopere@umich.edu)
Prof. Richard L. Marcus (marcusr@uchastings.edu)