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**VIA FACSIMILE**

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
c/o Peter G. McCabe
Secretary
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure Governing the Discovery of Electronically Stored Information

Dear Committee Members:

Our firm, Spriggs & Hollingsworth (www.spriggs.com), principally handles litigation on behalf of businesses, typically large national and multinational corporations. We try cases and handle appeals for our clients as both plaintiffs and defendants. Because we specialize in complex litigation, often serial litigation or multi-jurisdictional actions, we have a useful vantage point and experience from which to evaluate the Committee's proposals regarding electronic discovery.

In fashioning rules addressed to the discovery of electronic documents and data, it is important not to lose sight of the fundamental principles that long have guided discovery:

*First*, discovery never has been about producing every piece of paper (or electronic file) that is possibly pertinent to a case. There has always been a weighing process assessing the reasonableness of the cost of acquiring information as against its importance. More colloquially, the needle in the haystack may indeed contain crucial information, but the rules never have required that one *find* the needle but instead only that one engage in a reasonable *search* of reasonable scope. If that search turned up the needle, it is to be produced; if the needle remained lost among straw, that simply was an accepted reality of the balance struck between the pursuit of justice and the costs of obtaining perfect information.

*Second,* though often the point is elided, it is established beyond cavil that a company may destroy its own documents – even highly relevant documents – if the destruction was

reasonable (and conducted in good faith). *E.g., Wington v. Ellis*, 2003 WL 22439865 at *4, *6 (N.D. Ill. Oct. 27, 2003) (An organization "does not have to preserve every single scrap of paper in its business. [There is no] duty to preserve every single piece of electronic data in the entire company."); *Concord Boat Corp. v. Brunswick Corp.*, 1997 WL 33352759 at *4 (E.D. Ark. Aug. 29, 1997) ("[T]o hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all e-mail. . . . Such a proposition is not justified."). This is not to gainsay that there have been abuses popularly reported, but the Rules should be focused on the ordinary case, not the exceptional case, for which the Rules and tort law already provide ample remedies.

*Third*, unfortunately software for businesses was not designed to facilitate the easy identification of responsive materials and their cost-efficient production. With due admiration for the contribution of the computer hardware and software industries, those industries failed us when they overlooked this key aspect of the life cycle of documents. Consequently, companies are forced to employ separate systems in some fashion to address the need for archiving, identification, retrieval, production, and scheduled destruction of electronic materials. It is far too facile to lay the burden of producing electronically stored materials solely at the feet of the customers of software, as some courts have done. *E.g., Linnen v. A.H. Robins*, 1999 WL 462015 at *6 (Mass. Super. June 16, 1999) (Cost of retrieval and production of electronic documents is "one of the risks taken on by companies which have made the decision to avail themselves of the computer technology now available to the businessworld."). It is more accurate – and fair – to characterize the question presented as a normative inquiry into what costs *should be* imposed on companies in producing information, and what systems can we reasonably seek to require to manage information for litigation, rather than to say that a business willy nilly assumes the risks of the costs of production simply as a consequence of purchasing computer equipment.

*Fourth,* the reality is that companies want to implement systems that cost effectively manage their documents, and companies are moving to do so. But there are no easy, off-the-shelf solutions to email archiving and management, control of metadata, and facilitation of review for privilege; the easy ability to create documents, especially email and instant messages, has expanded the population of "documents" beyond those we had ever had before. No one had been sanctioned in the past because the contents of a telephone call were not transcribed but only could be examined by the memory of the participants; the *replacement* of voice with text communications should not necessarily produce a wildly different result, but that is the outcome in some courts today. The rules need to recognize that we are in a period of transition and not lose sight of the fact that (in our experience) most companies seem to be moving toward some form of management of electronic information; but it should not be the rules of civil procedure that dictate the adoption of information-management disciplines and technology, for that would be a law-making function beyond the Rules Enabling Act.

What do these principles suggest regarding the proposed amendments to the Federal Rules of Civil Procedure regarding discovery?

The creation of a safe harbor for the ordinary overwriting and destruction of data (and metadata) follows naturally; no "bad action" of the custodian can be inferred from such data destruction, and instead this type of automatic or routine destruction follows from the fundaments of software design and operation, something the custodian/document creator had no power to affect. There is a particular problem in "live" databases, which are continuously updated; no prior version of a database is preserved by its very nature, and the Committee's comments to the safe harbor rules should mention that this type of data overwriting is not considered sanctionable.

Similarly, the demarcation of material to be produced based on whether or not it is reasonably accessible is a good start. We are uncertain this standard will prove workable in practice, but it is a reasonable effort to strike the balance between the needs for the production of documents versus the burden of identifying and producing documents in the electronic age. Nevertheless, the Committee would be well advised to explain in the notes that metadata, embedded data, fragmented data, cached data, echoed copies, and similar electronic detritus are not considered to be the "document" itself that is to be produced. This information and data typically are not *reasonably* accessible separately, even if technically accessible, and it would be helpful to provide the courts with guidance that a requesting party needs to make a showing overcoming the presumptive burden of obtaining that type of material given its typically marginal relevance. In the ordinary case – which is what a rule should address – the modest informational value of such information would be substantially outweighed by its cost of retrieval and review. All of this is consistent with the fundamental notion of proportionality that was made manifest in the 1983 amendments to the Rules.

Finally, the Rules should permit the production of documents in electronic format but make clear that "native" format is not required. Just as the additional information in metadata should not be considered to be reasonably accessible in every case, it follows that the document should be able to be produced as an image rather than in native format. We certainly support steps to reduce the cost of discovery overall, but ironically production in native format – and necessarily the cost of reviewing and redacting embedded information that is *not* reasonably calculated to lead to the discovery of admissible evidence – would increase costs, burdens, and the amount of material that will be reviewed, all for no improvement in the quality and accuracy of information in the ordinary case.

We commend the Committee on its work, and we would be pleased to clarify any of the foregoing points.

Respectfully,

Joe G. Hollingsworth

Marc S. Mayerson