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Secretary of the Committee
on Rules of Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Sir:

Please accept the following comments with regard to the proposed Federal Rules of Civil Procedure that have been created to address the issues surrounding electronic discovery.

Rule 26(b)(2): At the outset I have concern over the use of the phrase "electronically stored information" which tends to expand the scope of discovery set out in Rule 26(b)(1). Principally the discovery of documents is what has generally been anticipated by the rules and this certainly includes notes, scraps of paper, articles, letters and other "documents." The concept of "electronically stored information" clearly anticipates a broader array of information that is maintained by a computer system but which may not be information created with intention, or even negligently and knowingly by an author. I have seen the Comments regarding this phrase in connection with the proposed amendments to Rule 34. I incorporate here those criticisms addressing the phrase that appears later in this letter. The use of the phrase "electronically stored information" as opposed to "documents" will have particular significance where a court is interpreting a "document retention policy" for reasonableness. If all "electronically stored information" is not covered under the DRP, the court may find willful or negligent spoliation by the mere operation of the DRP.

The comments do set forth with sufficient particularity definitions of "reasonably accessible." Undoubtedly, this phrase will take on more meaning in future cases interpreting it, but with the parameters prescribed for production, when there has been a showing that information is not reasonably accessible, we would expect future opinions to be practical. The practical application of the Rule should take into consideration the type of computer system as well as the type of data any particular party has in its possession. The amendments are needed but without the expanded scope of discovery to include "electronically stored information."

Rule 26(b)(5)(B): This amendment is absolutely imperative in light of the enormous amount of national litigation that takes place and the broad disparity in the state rules regarding waiver of privilege. The requirement for certification that the material has been returned, sequestered or destroyed is likewise essential to provide the full measure of protection of the Rule. This is particularly true with respect to matters that might constitute trade secrets or involve attorney-client conversations involving defenses to a criminal charge. There should be no objection to making such a certification in light of the requirement of the Rule.

Rule 26(f)(3): The Planning meeting for the parties set up more than ten years ago has devolved into a routine preparation of a form discovery plan for a stamped acceptance by the court. There is clearly a need for having the parties discuss electronic discovery and this is an appropriate time with the *proviso* that the plaintiff's lawyer often has not fully studied the matter to determine what information will be relevant to his/her claims and the defense lawyer has generally not had sufficient time to become familiar with the defendant's computer systems and data storage in order to discuss the electronic discovery issues in any informed manner. For these reasons, any provision regarding electronic discovery that is placed in the scheduling order should remain flexible for amendments by the court as more information is gleaned in the course of discovery. Experience has shown that very often judges hold tightly to matters set forth in scheduling orders and to do so with respect to electronic discovery at this early stage in discovery with regard to electronic documents could very well be counterproductive.

Rule 26(f)(4): The providing for treatment of privilege waiver in the scheduling order seems to contradict the provision under Rule 26(b)(5)(B). The latter is a much better method of handling the privilege waiver issue since the likelihood that the parties at the scheduling conference stage of the case resolving the issue of privilege is not very likely. This is particularly true in large party cases involving serious allegations of fraud and other claims that provide for very broad discovery. Presently the enormous burden of review required to prevent privilege waiver is so costly for many defendants that plaintiffs clearly have a club with which to bludgeon defendants into settlement, or otherwise to keep defendants on an unlevel playing field with suggestions to the court of spoliation and bad faith in production. In addition to the cost associated with such review, too often courts provide a limited time period in which the review must be completed and discovery produced. The review now has become an overwhelming burden that has unfortunately been enhanced by some plaintiffs in various forms.

Rule 34 Changes: The proposed amendment, which includes the phrase "electronically stored information" expands the scope of discovery unnecessarily. The current Rule 34 is sufficiently broad to include electronically stored documents, charts, excel spreadsheets, power points and emails. The way in which the proposed amendment recites "electronically stored information or any designated documents" suggests electronically stored information is different from documents that may be data or data compilations that are electronically stored. The Committee notes acknowledge the definition of "electronically stored information" is intended to be broad in order to cover the various computer functions and systems in current use and those that may come into being in the future. The proposed amendment would do better to simply keep the current definition of what is producible as opposed to expanding the entire scope of discovery permitted under Rule 34 in order to include every conceivable

electronic entry. For instance, merely because a computer will create metadata, does not, in this writer's belief, obligate a party to produce metadata regarding every document. It is true that some computer macros create documents in such a way that trying to retrieve a previous letter, for instance, results in the current date rather than the original date of the letter appearing on the retrieved letter. In this event, metadata may be useful in showing the original date of the letter. However, the production and use of files utilized by the computer in order to properly create and store documents could simply cause more confusion than elucidation of the factual background of certain claims. Requiring a party to search and produce "electronically stored information: abut discoverable documents goes too far. The definition for production is way too broad.

Subdivision B: The proposed amendment allowing designation of the form in which electronic discovery is to be produced is certainly appropriate. Nevertheless, it has been this writer's experience that production has been requested both electronically and in hard copy, both with government investigations and in civil litigation. Unquestionably, the cost of discovery is becoming a function of doing business in America. As this cost grows, the cost of discovery may likewise be the impetus to settle rather than proceed to a fair trial of the issues.

Rule 37(f): The proposed amendment addressing sanctions under Rule 37 is timely in light of the growing number of claims for sanctions arising from the loss of electronically stored information. However, the proposed amendment goes too far where it includes "and" instead of "or" between numbers one and two to the Rule. Additionally, this writer certainly agrees that culpability for any spoliation issues regarding electronically stored data must rise above negligence. The major reason for this is that millions of people who operate computers in this country and abroad do so without a full comprehension of how the equipment works. It is not feasible for each computer user to have a full blown course in internal computer operations in order to perform their job which requires data input and creation. Consequently, as computer systems become more sophisticated and inter-related, the likelihood that data will be lost from time to time, regardless of every effort to preserve it is great. A party in litigation should not be held accountable for such losses where they do not show a culpable state of mind in the circumstances.

Very truly yours,

Marion F. Walker

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