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To Rules_Comments@ao.uscourts.gov

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Subject Comments on Proposed Amendments to Fed R Civ P

Please enter my attached comments to the Proposed Amendments to the Federal Rules of Civil Procedure. Thank you

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February 15, 2005

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

Re: Comments on Proposed Amendments to the Federal Rules of Civil Procedure

Honorable Committee:

I have worked with the Federal Rules of Civil Procedure since 1976 as a law clerk at a major New York patent litigation firm and have worked as a programmer and systems analyst since 1970. I have been a Massachusetts member of the National Conference of Commissioners on Uniform State Laws since 1995 and was a member of its drafting committees on the Uniform Computer Information Transactions Act and the Uniform Electronic Transactions Act and am a current member of its Study Committee on Discovery of Electronic Evidence. I make these comments on my own behalf and that of the public on the proposed amendments to the Federal Rules of Civil Procedure relative to the discovery of electronic information.

Generally, I favor the proposed amendments. I propose, however, the language "discoverable in" should be stricken and "material to" substituted therefor in proposed Rule 37(f)(1) at line 865 of the draft safe harbor. Because the discoverability of information is based on "relevance" as well as the absence of a privilege or immunity, because "relevance" is measured both in materiality as well as absence of undue burden, and because proposed Rule 26(b)(2) introduces additional limitations on discoverability, the concept of knowledge of discoverability is too narrow an exception to the safe harbor. In a sense, it begs the question, since, if the condition of Rule 37(f)(2) applies, that is, there was a loss of information, the information is not "discoverable". The focus for a safe harbor should be the materiality of the information. If there are other reasons it is not discoverable than its inaccessibility owing to loss, sanctions do not necessarily apply. However, even privileged or immune information should be preserved if it is known to be material, as there may be an exception, such as a crime exception.

Respectfully submitted,

/s/
Stephen Y. Chow