02-ED-008

Office of General Counsel

December 17, 2002

Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, D.C. 20544

Re: Inquiry from Discovery Subcommittee of the U.S. Judicial Conference Advisory Committee on Civil Rules Regarding Discovery of Electronic Materials

Dear Mr. McCabe:

The Nationwide Insurance Companies ("Nationwide") has been invited by Mr. Richard Marcus to provide advice and observations to the Discovery Subcommittee of the U.S. Judicial Conference Advisory Committee on Civil Rules as it considers whether to develop proposals to amend the Federal Rules of Civil Procedure to address special features of discovery of electronic, or computer based information.

This response was prepared to address the key issues raised by Mr. Marcus in his September 2002 letter and accompanying memorandum. It is intended to facilitate further development of evidentiary issues related to electronic data. It was prepared on behalf of Nationwide with the assistance of Walter M. Jones, Esq., Martin & Seibert, Martinsburg, West Virginia and J. William Speros, Attorney Consulting in Computer Systems, Cleveland, Ohio. Where appropriate, comments to Mr. Marcus's key issues are provided as to both the technical and legal aspects of electronic discovery.

1. General background questions: e.g., is embedded data actually important?

Imbedded data is undefined. It may indicate one or more various attributes of or interrelationships within or between documents, as discussed more fully below.

Typical document attributes include: **Metadata,** properties of the document such as creation and modification date, author name, local file storage location, etc.; **Formatting**, special fonts including underscore, *italics* or ~~strikethrough~~; **Object Linking**, direct insertion of data that had previously resided outside the document; **Value Definition**, formulae or other data from which data are calculated or expressed. Normally, these attributes persist within a document and, therefore, are accessible

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whenever the document is viewed by the software type in which the document was authored.

By contrast, documents oftentimes contain codes representing interrelationships that may not persist over time. Some such interrelationships terminate by design, automatically whenever the document is saved or manually by the author's command. For example, Word processing applications **Track Changes** by graphically highlighting authors' edits, memorializing the thought process by which the document was authored. Similarly, particular Metadata, described above, changes over a document's life as sequential document versions are edited. Another common transient interrelationship that is imbedded within a document includes **Hyperlinks,** a mechanism by which data that resides elsewhere is integrated into the current document representation. Though hyperlinks may target data that is imbedded within the source document, often times they target data that resides elsewhere, in a foreign document. To operate, these linkages require that the target data are accessible and that the command to obtain and render those data is accurately interpreted.

Though pre-electronic, paper documents did not themselves carry this additional layer of imbedded information; each of these types of imbedded electronic data could be relevant to a particular case. Yet few are relevant to all matters. And even fewer are important to many. For example, if an integrated contract dispute revolves around the amount of a particular payment, then focus is appropriately directed to the dollar value expressed on the contract's page. By contrast, if the dispute relates to how a value was calculated, then imbedded, electronic information would be relevant and, perhaps, important. Resolution of the dispute could be driven by when that value was most recently changed, by the formulae pursuant to which the amount was calculated, and whether they reside within the document or elsewhere.

Capturing these data is expensive, particularly if the source documents have been extracted from their pre-existing environment. Moreover, sustaining the imbedded data avoids abstract or focused allegations of spoliation. Consequently, while some imbedded data may be important to a particular litigation matter, the importance ought to be weighed against the probative value of those data. The burden to demonstrate which imbedded data must be produced should be imposed upon the requesting party, as should any incremental costs beyond the initial cost of producing the source file.

2. Should FRCP 26(f) and 16(b) require parties to discuss electronic discovery issues or are the parties addressing this topic already?

Parties tend not to discuss this. However, as of Dec. 1, 2000, all federal district courts must comply with the 1993 amendment to *Federal Rule of Civil Procedure 26(a)(1)*, requiring litigants to turn over all materials relevant to a dispute including data compilations -- which by definition would include all **e-mail** and other **electronic** documents -- regardless of whether the other side has made a **discovery** request.

3. Should FRCP 26(a)(1) mandate a discussion of electronic records or

prescribe the form of production?

A mandated protocol for production must be adopted, although a generic format will likely fail. Unlike a paper production where the discussion may be limited to the application of Bates numbering and confidentiality stamps or screens, there are at least these three dimensions relevant to the production of electronic data: **content** which includes data values and time duration; **format** or the manner of portrayal; and **media** which may include paper, CD, Internet repository, etc. Source data is too diverse to prescribe a monolithic production without a technical discussion of the actual production mechanism. Clearly, a requirement to produce all electronic data relating to a specific subject allows significant discretion to the producer and ample opportunity for discovery disputes as to all parties.

4. **Should FRCP 34(b) be amended to insulate the effects of involuntary production of privileged documents (allowing the discovering party a quick look)?**

Although the actual procedure for the return of inadvertently produced documents varies, it is beyond argument that any discovery agreement or case management order should contain a procedure for the identification and return of inadvertently produced documents. Notwithstanding the duty to ignore inadvertently produced information, the real issue is the determination of appropriate time frames in which to respond to discovery requests to allow the producer to implement appropriate review and production processes and thereby minimize the risk of inadvertently producing information in the first instance.

5. **Should cost-shifting rules be added to Rule 26(2) or 26(c)? Order as occur during case (pay as you go) or deferred until the end? Can a multi-factor test be sufficient or should it emulate Texas 196.4 and ABA Discovery Standard 29 and shift costs of special expenses or extraordinary steps? (p. 9.)**

Rules 26(c) and 26(b)(2) empower a court to shift costs where it deems it necessary. However, the Rules do not provide meaningful guidance to the court in exercising this discretionary function. In the absence of a Case Management Order, it is unlikely that any court will pay attention to unique issues and resultant costs of electronic discovery. Courts are generally uneducated on the issue of burden and cost and make decisions in accordance with the social theory that each party bear its own costs. In the absence of expert testimony, the court will be faced with a burden affidavit that will appear incredible, and production will proceed. This issue was addressed in Electronic Discovery and the Litigation Matrix, by Martin H. Redish, Duke Law Review, November 2001, page 561, where he stated:

> In a number of ways, the abusive and inherent costs may become intertwined in a hybrid category. This hybrid category may be described as

"excessive" discovery costs. It shares aspects of the first two categories, in that, like nonabusive discovery, it can be presumed not to derive from any motivation on the part of the discovering party other than to gain information related to the case but, like abusive discovery costs, it includes costs that are not--on an objective basis--necessary to the fair and accurate adjudication of the case. What links the categories of abusive and excessive costs together is the concept of externality, defined as "a cost or benefit resulting from a decisionmaker's activity that does not accrue to the decisionmaker and is thus 'external' to his decisionmaking process." John K. Setear, *Note, Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 Yale L.J. 352, 352 n.5 (1982). Discovery requests give rise to externalities under the current system for the simple reason that the discovering party is not normally required to pay the often significant costs of assembling material in response to the request. Robert D. Cooter & Daniel L. Rubinfeld, *Reforming The New Discovery Rules*, 84 Geo. L.J. 61, 65 (1995). Thus, the cost associated with the request is generally not a relevant factor in a party's decision to make a particular discovery request. Hence, a party will not be dissuaded from making a discovery request on the ground that the likelihood of producing valuable information is relatively low, because he effectively has nothing to lose. In the words of two respected legal economists, "the rational requesting party will request information that increases the expected value of her legal claim by a little, even though compliance costs the other party a lot." *Id*. Indeed, the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request. (See *Setear*, *supra* note 162, at 353.) It is, then, all but inevitable that this externality--indeed, the perverse economic incentive--created by the current cost allocation system will result in excessive and, therefore, inefficient discovery even where the discovering party does not consciously intend the discovery to be abusive.

6. **Should a rule address the search burden for initial disclosures or discovery by clarifying that there is no duty to search all responsive materials that could be found on backup media or on deleted material from hard disks?**

Naturally, the producing party would seek to constrain its duty to produce electronic data. Doing so limits both the discovering party's acquisition of information relevant to the case and reduces costs necessary to acquire, assess and produce the information.

The question itself offers a boundary beyond which data need not be produced due to the presumed burden accessing particular data would impose. Yet the two types of boundaries are not aligned and would tend to encourage the producing parties' altering the management of its computer systems to protect information. Naturally, these results conflict with the public policy upon which discovery is based.

More specifically, the question offers two boundaries beyond which a producing party need not go to re-acquire data.

The first such boundary consists of data archived to **"backup media."** While that term is not clearly defined, it is presumed to mean devices such as (in contemporary terms) magnetic or optical data storage mechanisms whose data must be restored to online systems before they are accessible to computer systems' end-users. Employing back-up media is common business practice intended to mitigate the damage that would otherwise arise from computer hardware failure or end-user error. In such circumstances, data stored on backup media would be restored to replace the damaged or destroyed information. Therefore, it is common practice, to backup all computer information, not only information whose transactions have been previously completed but contemporaneous ones as well.

Consequently, if discovery rules authorize a producing party to withhold data that are stored on backup media, then the producing party would need to produce virtually no information whatsoever. If instead the discovery rules authorize the producing party to withhold data that are exclusively available on back-up media, then the rules would encourage companies to migrate data storage from online, directly accessible systems to offline less expensive backup media.

The question offers a second boundary beyond which a producing party need not go to acquire information, **deleted or purged data.** Once deleted, it is very expensive to try to recover data and the likelihood of doing so diminishes significantly as time passes. Normally, the process of deleting or purging computer systems of data are governed by document retention policies whose interpretations are based upon the personal and less carefully impressions of a computer user. Consequently, if the discovery rules excuse the producing party's producing data that are purged, "hidden by design," then this would encourage producing parties' to eliminate problematic data.

The question seeks to offer boundaries that are likely to encourage producing parties' altering their business practices to minimize the duty to produce data. How to balance the producing parties duty relative to the cost of that duty is a key question.

Yet constructing boundaries ought to take into consideration circumstances beyond the two indicated examples that arise regularly. These circumstances include data:

- "Hidden in plain sight" by the large quantity of data spread throughout the enterprise's data systems
- "Hidden by obsolete media" as occurs when data from old computer systems are migrated to new systems but their original data are left behind on equipment that is no longer maintained but falls into an unusable condition (e.g., Eight-Track tapes)
- "Hidden by passwords" or other intentionally imposed encryption techniques whose keys necessary to access are lost or forgotten.

In summary, how to balance the interests imbedded in public policy for parties in litigation to produce information relative to the cost to do so is an important question. Yet it is not likely to be resolved with bright-line boundaries that identify particular contemporaneous technologies because they will necessarily change as new technologies become available. Moreover, how organizations employ technology will change based upon discovery rules.

This issue should be addressed either by the parties or the court when the scope of the discovery is being defined, presumably after applying a balancing test of likely relevance, probative value, burden and cost.

7. Should the rules prescribe preservation obligations, a clear trigger for those obligations and describe what must be done (reasonable steps) once triggered (i.e., is a safe harbor needed for actions which may make electronic information later unavailable should it be ordered)?

One writer, having reviewed the American Bar Association Civil Discovery Standard 29(a)(iii), which provides for restoration of material deleted in the regular course of business only on a showing of substantial need, recommended an amendment to Rule 34(d) as follows:

> No sanctions or other relief predicated upon a failure to maintain or preserve documents or data, including electronically stored information, shall be entered in the absence of a discovery request that describes with particularity the specific documents or data requested and evidence that (1) the documents or data requested were relevant to the claim or defense of a party and (2) the party upon whom the request was served willfully failed to preserve such documents or data. Evidence that reasonable steps were undertaken to notify relevant custodians of preservation obligations shall be prima facie evidence of compliance. Nothing in these rules shall require the responding party to suspend or alter the operation in good faith of disaster recovery or other electronic or computer systems absent court order issued upon good cause shown.

Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery (There are Vast Differences between Discovery of Hard-Copy Documents and Those Stored Electronically, and the Difference Should be Recognized*), Defense Counsel Journal, April 2001.

The nature of the responses provided by this writer alone evidences the substantial and immediate need of the private sector to study and provide guidance to the judiciary on these issues that will have such a significant impact on business operations and litigation budgets.

Nationwide would like to thank the Committee for this opportunity to provide advice and input into this important topic.

Very Truly Yours,

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Nationwide Insurance Companies