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

Re: Inquiry From Discovery Subcommittee On Civil Rules Regarding Electronic Discovery

Dear Mr. McCabe:

I write this letter on behalf of the Committee on Federal Courts of the Association of the Bar of the City of New York (the "Committee") to provide the Committee's views on the advisability of amendments to the Federal Rules of Civil Procedure addressed specifically to the discovery of electronic evidence.

This letter explores several of the principal issues that often arise in the context of electronic discovery and provides the Committee's recommendations as to each. As set forth in greater detail below, it is the Committee's belief that sweeping changes to the Federal Rules are unnecessary at this time, as the current Rules provide an adequate framework for the resolution of many key electronic discovery issues. However, the Committee feels that two potentially

fruitful areas of amendment to the Rules unique to electronic discovery can be identified: (1) amendments to the text of Rule 34(a) to ensure the discoverability of all forms of computerized data; and (2) amendments to Rule 26(f) to facilitate the earliest possible identification of electronic discovery issues.

The Discoverability of Electronic Data.

Rule 34(a) of the Federal Rules of Civil Procedure was amended in 1970 to include "data compilations" within the definition of discoverable "documents." As currently drafted, the Rule reads as follows:

> (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

The addition of "data compilations" to Rule 34(a) was expressly designed to keep up with changing technology and to facilitate the production of electronic information. *See* Fed. R. Civ. P. 34(a), Advisory Committee Notes to 1970 Amendments. As a result, Courts have almost universally interpreted the 1970 amendments to Rule 34(a) as permitting a request for production of electronic evidence. *See, e.g., Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1995 U.S. Dist. LEXIS 16355, at *4 (S.D.N.Y. Nov. 3, 1995) ("today, it is black letter law that computerized data is discoverable if relevant"); *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, No. 98 Civ. 8272, 2002 U.S. Dist. LEXIS 8308, at *11 (S.D.N.Y. May 8, 2002) ("Rules 26(b) and 34 of the Federal Rules of Civil Procedure instruct that computer-stored

information is discoverable under the same rules that pertain to tangible, written materials.") Moreover, the phrase "data compilations" has been interpreted broadly, permitting discovery of raw computer data, archived data and data stored on backup media. *See, e.g., Simon Prop. Grp., L.P. v. MySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) ("computer records, including records that have been 'deleted,' are documents discoverable under Fed. R. Civ. P. 34 "); *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382-83 (7th Cir. 1993) (raw data discoverable under Rule 34); *see generally* 5 WEINSTEIN'S FEDERAL EVIDENCE § 900.01 (2003) ("Residual and deleted data are discoverable").

This broad interpretation of the phrase "data compilations" accorded by the courts to date is in keeping with the underlying purposes of the discovery rules. *See* Fed. R. Civ. P. 1. Technological developments, however, have highlighted the potential inadequacy of the phrase. In a recent article, Judge Shira Scheindlin and Jeffrey Rabkin note that certain widespread sources of potentially relevant information – such as internet history, temporary, cookie and cache files – may fall beyond the scope of the current Rule 34(a) because these data are computer-generated and are therefore not "compilations" in the ordinary sense. *See* Hon. Shira A. Scheindlin and Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. Rev. 327, 372 (March 2000). While the courts do not yet appear to have taken such a restrictive view of the phrase "data compilations," small revisions to the text of Rule 34(a), designed to clarify that all forms of data fall within the scope of the Rule, may prove fruitful should broader revisions to the discovery rules be undertaken.

Judge Scheindlin and Mr. Rabkin propose the following changes to the text of Rule 34(a) (additions underlined in bold text; deletions in strike-through text):

(a) Scope. Any party may serve on any other party a request (1) to

> produce and permit the party making the request . . . to inspect and copy any designated documents **or any designated data** (including writings, drawings, graphs, charts, photographs, phonorecords, and **electronically-stored information** ~~other data compilations from which information can be obtained~~ . . .).

Scheindlin and Rabkin, *supra* at 372.

The Committee agrees in concept with this proposed amendment to Rule 34. However, the use of the phrase "electronically-stored information" has the potential to open up additional unintended loopholes to Rule 34 production as information storage technologies change. Recent news articles, for example, have discussed entirely new forms of non-electronic computing technology that do not necessarily fall within the scope of the phrase "electronically-stored information." *See, e.g.,* Financial Times, *Tech That Can Change The Way Enterprises Work* (Financial Express Global Newswire, Feb. 4, 2003) ("All kinds of newer hardware approaches ranging from nanocomputer to molecular or quantum computers are set to emerge in the near future."); Dr. William Reville, *Future is DNA Computers*, The Irish Times (City Ed. Apr. 4, 2002) (discussing development and current uses of DNA computing and noting its power to "solve in hours complex mathematical problems which would take electronic computers hundreds of years"). While even the experimental uses of these technologies are in their initial stages, the existence of non-electronic computing technologies highlights the fact that the Rule 34(a) inquiry should not turn on the manner in which otherwise relevant data is "stored" any more than it should turn on how (or whether) the data is "compiled."

The Committee is of the view that Rule 34(a) should be broad enough in scope to permit a request for production of information that can be extracted from data in any form, notwithstanding the manner of its storage or compilation. The following modifications to the text of Rule 34(a) are therefore recommended (additions underlined in bold text; deletions in

strike-through text):

> (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy any designated documents **or data** ~~(including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations~~ from which information can be obtained~~;~~ (translated, if necessary, by the respondent through detection devices into reasonably usable form) . . . .

An amendment to Rule 34(a) of this nature would satisfy the concerns expressed by Judge Scheindlin and Mr. Rabkin, while allowing the Rule to adapt to ever-changing modes of computing technology. Any such change would also call for conforming amendments to the text of Rules 26(a)(1)(B)-(C), 26(b)(1) and 34(c).[1]

Preservation Obligations & Spoliation.

Issues relating to spoliation and sanctions often obtain particular significance in the context of electronic discovery. *See, e.g.,* Gregory P. Joseph, *Negligent Delay In Producing Electronic Data Is Sanctionable*, New Jersey L.J. (Jan 6, 2003). Three principal spoliation issues involve: (1) identifying when the duty to preserve evidence arises; (2) determining the requisite state of mind for breach of the duty; and (3) defining the scope of the duty. There is a well-developed body of caselaw, formulated in the context of traditional paper discovery jurisprudence, addressed to each of these issues. The key issue for present purposes therefore becomes whether electronic evidence is so qualitatively different from paper discovery that separate spoliation rules should be crafted for each. The Committee is of the view that it is not.

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[1] Judge Scheindlin and Mr. Rabkin also recommend the deletion of "and" and the insertion of a comma before the phrase "which are in the possession, custody and control of the party upon whom the request is served" in Rule 34(a) in order to clarify that the possession, custody and control requirement applies to both the document production and inspection clauses of the Rule. The Committee agrees with this proposed change.

Timing and State of Mind. Generally speaking, the duty to preserve evidence arises when the party possessing the evidence has notice of its relevance. 7 MOORE'S FEDERAL PRACTICE § 34.16 (2002). Under the facts of particular cases, this means that the preservation duty may be triggered by pre-litigation activities and correspondence, the filing of a complaint, or upon receipt of a preservation demand. *See, e.g., Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166, 168-69 (D. Colo. 1990) (relevance of computer source code made clear through pre-litigation discussions and filing of complaint); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991) (service of complaint). Of course, once a discovery request has been made, the receiving party is clearly on notice of the relevance of all information requested therein and has a duty to preserve. *See Hansen v. Dean Witter Reynolds Inc.*, 887 F. Supp. 669, 675 (S.D.N.Y. 1995).

Violation of the duty to preserve is sanctionable, both under the courts' inherent power or, where a discovery order has been violated, under Rule 37(b). *See, e.g., West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999); Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 26(e)(3) (3d Ed. 2000). Whether sanctions will issue upon a finding of simple negligence, or whether a showing of bad faith is required, is an issue still open to some debate. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) (mere delay in producing electronic discovery may be sanctioned upon showing of simple negligence). *Cf.* Joseph, *Negligent Delay, supra* ("Inherent-power sanctions . . . require a showing of bad faith [under] *Chambers v. NASCO Inc.*, 501 U.S. 32 (1991). The Second Circuit [in *Residential Funding*] did not discuss this prerequisite, and it would appear to be incompatible with a sanction based on negligence, in the absence of a court order [implicating Rule 37].")

Significantly, neither the timing of the duty to preserve nor the governing standard of

care finds any express basis in the text of the Federal Rules of Civil Procedure. An argument can be made in support of an amendment to the Rules designed to clearly identify when the duty to preserve is triggered; to set forth the appropriate standard of care; and to provide an express statutory basis for sanctions if the duty is violated outside the limited context of Rule 37(b).[2] While the particulars of any such amendment – such as precisely when the duty to preserve should attach and the requisite state of mind – are fairly debatable, an amendment of this nature could potentially yield the dual benefits of consistency and clarity for both courts and litigants.

These potential benefits are worthy of further consideration. It is the Committee's view, however, that the timing of the duty to preserve and the appropriate state of mind should be treated identically notwithstanding the nature of the evidence at issue. Any rule change designed to clarify these issues is therefore most appropriately addressed in the context of all forms of

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[2] An example of the form such an amendment might take can be found in the Private Securities Litigation Reform Act of 1995, which amended the Securities Exchange Act as follows:

> **A. Preservation of evidence**
>
> **i. In general**
> [] unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.
>
> **ii. Sanction for willful violation**
>
> A party aggrieved by the willful failure of an opposing party to comply with clause (i) may apply to the court for an order awarding appropriate sanctions.

15 U.S.C. § 78u-4(b)(3)(C).

discovery.

Scope Of Preservation Obligation. As one commentator has noted, "[p]erhaps the most intractable problem associated with computer-based information is whether the duty to preserve evidence requires a party to prevent the inadvertent destruction of residual and deleted files at the outset of litigation." 5 WEINSTEIN'S FEDERAL EVIDENCE § 900.01[4][c][iii] (2003). Should the Federal Rules explicitly define the preservation efforts a party must undertake at the outset of litigation?

The Rules, for example, could require litigants to make "mirror images" of their information storage media for all computers containing potentially relevant information. This practice would preserve all electronic evidence on the drive imaged – including "meta" data, archived files and deleted data. While the technology currently exists to perform this kind of imaging, the costs associated with this practice would far outweigh the benefits in the vast bulk of cases. *Id.* Not surprisingly, no court has required such immediate large scale mirror imaging at the outset of litigation under the current rules absent a substantial showing of justification. *Id.*

That is not to say, however, that mirror imaging would be inappropriate in all cases. Indeed, it may be entirely appropriate upon a showing justifying the effort. *See id*; *See also, e.g., In re Pacific Gateway Exchange, Inc. Sec. Litig.*, No. C 00-1211, 2001 U.S. Dist. LEXIS 18433, at *6 (N.D. Cal. Oct. 15, 2001) (requiring party to make two laptop computers available for "mirror imaging or other processes designed to retrieve or preserve electronic data" after finding that there was a significant risk that relevant documents . . . could be irretrievably lost").

For present purposes, the important point is that it would be nearly impossible to formulate strict preservation requirements that would serve their intended function in all cases. The Committee is of the view that any attempt to explicitly define the scope of the duty to

preserve evidence in a vacuum – detached from the needs of particular cases – would prove unworkable in practice, and would be both over- and under-inclusive under the facts of particular cases. These issues are most appropriately addressed by the parties and the courts in the context of the Rule 16 and Rule 26(f) conferences. In those unique situations calling for extraordinary preservation efforts, including widespread "mirror imaging," at an earlier stage of the litigation, the current Rules permit the litigants to seek and obtain a stipulation, preservation order,[3] or expedited discovery. The Committee feels that this framework provides the appropriate degree of flexibility for these issues to be tailored to the needs of each case.

Form of Production.

The Federal Rules of Civil Procedure contain no requirement that electronic information be produced in any one specific form. In its current formulation, Rule 34(a) requires that the responding party translate electronic data into a "reasonably useable form," leaving the determination of what is "reasonably useable" to the courts and the parties in particular cases. *See* Fed. R. Civ. P. 34(a), Advisory Committee Notes to 1970 Amendments (noting that the burden placed on responding parties under Rule 34(a) "will vary from case to case").

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[3] An example of a comprehensive preservation order was employed by Magistrate Judge Shields in the Southern District of Indiana in *In re Bridgestone/Firestone, Inc. ATX, ATX II and Wilderness Tires Products Liability Litig.*, available at <http://www.insd.uscourts.gov /firestone/default.htm>. Other examples include, *e.g., Smith v. Texaco, Inc.*, 951 F. Supp. 109 (E.D. Tex. 1997) (court modified temporary restraining order prohibiting defendants from moving, altering or deleting potentially pertinent electronic records to allow ordinary course deletions subject to retention of a hard copy), *rev'd on other grounds*, 263 F.3d 594 (5th Cir. 2001); *In re Infant Formula Antitrust Litig.*, MDL Dkt. No. 878, 1991 U.S. Dist. LEXIS 20252, at *2-3 (N.D. Fla. Aug. 16, 1991) (stipulated order imposing duty to preserve "any relevant document or other relevant item," including "all mechanical and electronic sound records or transcripts thereof, any retrievable data whether carded, taped, coded, electrostatically, electromagnetically or otherwise, and other data compilation from which information can be obtained").

Three principal alternative options to this case-by-case rule have been offered. On the one hand, Rule 34 could be revised to require production of documents in the same form in which they are stored on the responding party's system. *See* Scheindlin and Rabkin, *supra* at 374-75. Such a rule would yield the benefits of clarity and simplicity in terms of the responding party's obligations; has the potential to reduce discovery costs to the responding party; and would automatically take into account those aspects of electronic information – such as the existence of "meta" data – that are not easily captured in a hard-copy production of electronic data. *See id.*

Such a rule would have far-reaching implications, however, which may not be desirable in every case. For example, under this rule, the burden of converting the data into a useable form – often the most time consuming and expensive aspect of electronic discovery – would fall squarely upon the requesting party. In some cases, however, it would be significantly less costly for the requesting party to employ its own software and systems to review, convert and/or print the requested data. Moreover, in situations where the electronic evidence exists in a format that is unique to the responding party's proprietary and/or licensed systems, the task of conversion could be prohibitively expensive and/or impossible for the requesting party.

On the other hand, Rule 34 could be amended to require the responding party to convert all e-discovery into an electronic form "reasonably useable" to the requesting party. In practice, this is sometimes accomplished by converting the electronic data into a "database" format, which combines: (1) an "image" of each underlying document (such as a "*.tif" file); with (2) a text database capturing relevant "meta-data." Such a conversion, however, often requires the significant expenditure of resources – in terms of time, computer expertise and money – yet it may not yield discernible benefits in every case.

The final alternative would be to require the production of electronic data in hard copy only. While such a rule would be entirely appropriate in certain cases – for instance, in situations where "meta-data" is not expected to yield significant returns in terms of relevant information – as a general proposition such a rule would be undesirable, since hard-copy versions are often not the functional equivalent of data in its electronic form. Scheindlin and Rabkin, *supra* at 375.

While each of these alternative rules could be predicted to result in significant benefits in particular cases, no single approach would yield satisfactory results in all situations. Accordingly, the Committee is of the view that the case-by-case approach of the current Rule 34(a), which requires that a responding party produce electronic data in a "reasonably useable" form, is well-suited to facilitate judicial adaptation in the face of the myriad of potential situations which arise in the context of electronic discovery, particularly if coupled with the proposed amendments to Rule 26(f) (discussed below) requiring the identification and resolution of electronic discovery in the early stages of litigation.

Costs Of Production.

Paper discovery has always been protracted and costly – particularly in complex cases. But the sheer volume of electronic discovery can result in a dramatic increase in discovery costs. *See Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002) ("discovery expenses frequently escalate when information is stored in electronic form"). *See also Alexander v. F.B.I.*, 188 F.R.D. 111, 117 (D.D.C. 1998) (restoration of single archived drive required approximately 265 hours of work and $15,675 in contractor fees).

Both the 2000 and 1983 amendments to the Federal Rules provide a flexible framework designed to protect litigants from undue costs and burdens associated with overbroad discovery

under the facts and circumstances of particular cases. As currently drafted, Rule 26(b)(1) limits discovery to matters relevant to a "claim or defense" absent a showing of good cause. Rule 26(b)(2) further provides three express limitations on discovery which can be raised by any party or by the court on its own initiative:

- Under Rule 26(b)(2)(i), discovery may be limited if it is "unreasonably cumulative or duplicative," or can be obtained "from some other source that is more convenient, less burdensome, or less expensive";
- Under Rule 26(b)(2)(ii), discovery may be limited if requesting party has had "ample opportunity to obtain the information sought"; and
- Under Rule 26(b)(2)(iii), discovery may be limited if "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

All discovery under the Federal Rules of Civil Procedure is subject to these "proportionality" requirements. In addition, Rule 26(c) permits the courts to issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." While neither Rule 26(c) nor any other provision in the Federal Rules expressly provides for cost shifting, it is relatively clear that "the plenary power to deny discovery altogether [under Rule 26(c)(1)] includes the less significant power to allocate discovery costs between parties." 6 MOORE'S FEDERAL PRACTICE § 26.47 (2002). Indeed, the Advisory Committee Notes to the 1970 amendments to Rule 34(a) specifically contemplate the use of cost-shifting in the electronic discovery context under Rule 26(c). *See* Fed. R. Civ. P. 34(a), Advisory Committee Notes to 1970 Amendments ("the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs").

It is the Committee's view that the detailed proportionality rules of Rule 26(b)(2), and the availability of cost-shifting Rule 26(c), provide an adequate, flexible mechanism to protect litigants from unreasonable cost and expense associated with discovery of both paper and electronic evidence. The Committee believes that no cost-shifting amendment, particular to electronic discovery alone, is necessary at this time.

Privilege Waiver.

One topic frequently discussed in connection with electronic discovery concerns the issue of privilege waiver. Under current jurisprudence – developed in the context of traditional paper discovery – a party under certain circumstances may waive their right to assert privilege over documents inadvertently produced during the discovery process. *See* 3 WEINSTEIN'S FEDERAL EVIDENCE §§ 503.42 and 511 (2003) (noting three diverse approaches to privilege waiver). This rule effectively places a burden on the party responding to a discovery request to scrupulously review all documents for potential privilege prior to their production, at significant cost and expense.

It has been suggested that, in the electronic discovery context, the sheer volume of electronically stored data compels consideration of a different rule – such as a rule in which parties are permitted to assert a privilege objection at any time prior to trial. It is the Committee's view, however, that these privilege waiver concerns are not unique to electronic discovery. The potentially significant consequences of inadvertent production inhere equally in the traditional paper discovery context. This is particularly true in modern, complex litigations, where the parties are often called upon to gather, review and produce massive amounts of

information – in both electronic and paper form – in relatively short periods of time.[4] The Committee therefore recommends that any rule change tailored to privilege waiver issues would be most appropriately addressed in the context of proposed changes to the discovery rules in general.

Possible Amendments To Rule 26(f).

The identification of issues at the earliest possible stage of litigation is the key to effective management of electronic discovery. Indeed, most if not all of the difficult issues that arise in the e-discovery context could be alleviated through prompt identification and resolution at the beginning stages of discovery.

One effective way to accomplish this goal would be through an amendment to Rule 26(f) requiring litigants, where necessary, to identify and address e-discovery issues during the discovery planning process. One unique model for such changes can be found in the local rules of the United States District Court for the District of Wyoming. Those rules require counsel to "carefully investigate" their client's information management system prior to the Rule 26(f) conference "so that they are knowledgeable as to its operation" and "reasonably review" their client's computer files "to ascertain the contents thereof." *See* District of Wyoming Local Civil Rule 26.1(d)(3). Parties are required to notify opposing counsel of their intention to seek discovery of computer-based information. *Id.* at Rule 26.1(d)(3)(A). During the Rule 26(f)

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[4] It is worth noting that both litigants and the Courts have developed innovative methods of dealing with privilege-waiver issues in complex cases. For example, parties frequently enter into pre-discovery "claw-back" agreements and/or seek protective orders preserving the attorney-client and work-product privileges from inadvertent waiver. *See, e.g.,* 6 MOORE'S FEDERAL PRACTICE § 26.47 (2002) (collecting cases). It is the Committee's view that such agreements should be clearly endorsed and respected in all instances – not merely in the context of electronic discovery.

conference, parties are instructed to attempt to reach agreement on several key issues, including the scope of preservation obligations, the scope of e-mail discovery, search protocols, privilege waiver, the extent to which restoration of backup or deleted information is needed, and cost sharing. *Id.* at Rule 26.1(d)(3)(B). Counsel are required thereafter to report to the district court on these issues at the Rule 16 initial pretrial conference.

The Committee believes that the approach taken by the District of Wyoming is a step in the right direction. An amendment to Rule 26(f) specifically tailored to electronic discovery issues of the kind employed in Wyoming would serve a number of useful functions, including: forcing litigants to identify and address e-discovery issues at the beginning stages of litigation where they are most effectively resolved; facilitating stipulated resolutions of issues that do not require judicial resolution and teeing up those issues that do earlier rather than later; and scaling the degree of additional costs and efforts placed upon litigants to the requirements of particular cases. The Committee strongly recommends further consideration of such an amendment to Rule 26(f).

Conclusion.

The Committee hopes that this letter proves helpful to the Discovery Subcommittee in its consideration of possible amendments to the Federal Rules. We are, of course, available to you for further comment as the process of considering particular amendments, if any, continues.

Sincerely,

Thomas H. Moreland

Thomas H. Moreland