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To: peter_mccabe@ao.uscourts.gov
cc: marcusr@uchastings.edu, Lee_rosenthal@txs.uscourts.gov, "Thomas Y Allman" <allmant@basf-corp.com>
Subject: Comments on Memorandum to Advisory Committee Regarding Proposed Rule Changes

Dear Mr. McCabe:

I have had the opportunity to review the Memorandum dated September 15, 2003 that Rick Marcus circulated to the Advisory Committee on Civil Rules after the Discovery Subcommittee meeting of September 5, 2003. I believe that the Subcommittee has made an excellent start on the difficult topic of electronic discovery, but I do have some comments which I hope will be constructive. While my perspective is as the General Counsel of a multinational company with a large and continuously evolving litigation case load, I believe that my comments reflect the views of many of my fellow General Counsel.

1. Need For Separate Definitions. I am not sure that a separate definition of the "scope" of electronic information is useful. The only point that it makes is that electronic information can permeate and appear in all sorts of unexpected places. This type of concern is not new. The Rule 34 "document" concept has worked quite well even though, for example, Xerox machines were unknown in 1938. If someone wants to push the envelope to get copies of the information on FEDEX delivery pads, that person can ask for the information and the discovery procedures (including objections based on "accessibility") will be used to resolve the issue. I would suggest a simple amendment to Rule 34 and the use of the phrase "information maintained in electronic form" wherever specificity is needed.

2. Metadata and Embedded Data. Similarly, I would not provide special rules for the production of metadata and embedded data in the Rules. I would leave it to an individual party to decide if they wish to seek it, and, if production is objected to, let the parties agree upon or argue about the relative needs and merits of the request in the context of that case.

3. Form of Production. I suggest that a party should request a particular format of production and put the burden on the producing party to object to the form selected and to explain why. Thus, Rule 34(D)(ii) could say that unless a court orders otherwise, the party producing information maintained in an electronic form may produce it in the same form in which it is stored or in any other reasonably useable form.

4. Option to Produce Electronically Stored Information. I see no need

for a separate provision in Rule 33 on this topic and would simply amend Rule 33 to make it clear that the general provision applies to information maintained in electronic media. Under no circumstances would I suggest that the option to make records available automatically requires turning over software. For various reasons, including proprietary issues and the broader issue of the scope of the Rules themselves, whether software should be produced should be resolved as a question of whether the producing party really has or has not made the information available. If a series of incomprehensible data groupings are turned over without explanation or assistance, there has been no compliance with the option.

5. Rule 26 Amendments Targeted at Information Maintained in Electronic Form.

(a) Scope [Rule 26 (h)(1)]. As noted above, no separate definition is really necessary provided that documents are defined to include information maintained in electronic form.

(b) Accessibility Standard [Rule 26 (h)(2)].

The Proposal is, in my view, correct in making the focus of the duty to produce the degree to which the information is "accessible," provided that the concept of physical or technical accessibility is judged within the context of the business in which the producing party operates.

Thus, I would suggest reformulation of Rule 26(h)(2), which is currently phrased in the negative, to make that affirmative point. A positive formulation might be that: "In responding to discovery requests for information in electronic form, a responding party shall produce responsive information within the scope of Rule 26(b) which is reasonably accessible in the ordinary course of business." If the responding party did not agree that information sought was accessible as defined, it would ojbect . Then, the final sentence of Rule 26(h)(2) could state that if, after objection, inaccessibility is found, the Court would have the option to (1) sustain the objection and order that no further discovery be had, or (2) if it orders further discovery, include cost-shifting to mitigate the burden. However, limiting the costs shifted to those incurred to "obtain" the information is far too narrow. The anecdotal evidence to date indicates that the associated costs are not merely hardware costs but also include review costs. Accordingly, I would also recommend addition of a phrase along the lines of "For these purposes, in the assessment of burden and expense or in any cost shifting analysis, the Court shall consider all costs necessary for the production and content review undertaken from the perspective of the producing party." This type of guidance would be helpful to achieve the objective of providing certainty to the Courts and the parties.

I understand from Rick's Memorandum that the Subcommittee does not believe that it is necessary to restore and search backup media without a Court order. While I agree that the contents of electronic backups used solely and in good faith for disaster recovery are not "reasonably accessible in the ordinary course of business," I think that could be better handled by a Comment. There are really two problems here. First, from a technology standpoint, the problem with accessing backups relates to the

costs and difficulties of restoring them to a searchable format and then undertaking a review. A second problem, however, is that the Rules should not require suspension of routine computer systems merely because litigation exists. That policy issue (as Rick suggests) is best treated in a separate provision, such as (h)(3), discussed below.

(c) Preservation Obligations [Rule26 (h)(3) and Alternative Rule 34.1] I have reservations about providing a general preservation standard in the Rules, as opposed to allowing the matter to continue to develop on a case by case basis. I am not aware of any other part of the Rules that requires a producing party to affirmatively act outside the litigation context. I am not sure that this is within the scope of the Rule-making power. Moreover, there is no logical reason why a preservation standard should be limited to information maintained in electronic form. Accordingly, if the topic is going to be dealt with at all, a new Rule (such as the Proposed 34.1) is preferable. And if that approach is taken,

the requirements should be oriented to a process rather than a blanket injunction. Thus, "all parties must undertake reasonable efforts to preserve readily accessible documents and tangible things which may be reasonably anticipated to be relevant to the claims or defenses involved in the litigation." A far preferable approach, however, would be to concentrate on the point that the Rules are not intended to require an automatic suspension of computer operations - but to leave room for individualized court-ordered suspension in a specific case upon showing of substantial need. However, the requirement that this admonition is "conditioned" on the preservation of a "single day's full set of such backup data" is quite objectionable. In a multiple litigation context with new cases filed every day, this requirement - whatever it refers to - comes close to requiring creation of backups.

Again, I extend my congratulations to the Subcommittee for undertaking this difficult drafting process and I hope my comments are helpful.