FINE, KAPLAN AND BLACK, R.P.C.
ATTORNEYS AT LAW
23RD FLOOR, 1845 WALNUT STREET
PHILADELPHIA, PENNSYLVANIA 19103

(215) 567-6565
FAX: (215) 568-5872
E-mail:mail@finekaplan.com
www.finekaplan.com

ALLEN D. BLACK
ARTHUR M. KAPLAN
DONALD L. PERELMAN
ROBERTA D. LIEBENBERG
MICHAEL D. BASCH
JEFFREY S. ISTVAN
JENNIFER L. MAAS
MARY L. RUSSELL
GERARD A. DEVER
MICHAEL F. MIRARCHI
TARA H. BOYD

AARON M. FINE
OF COUNSEL

October 5, 2004

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

Re: Proposed Amendments Regarding E-Discovery

Dear Mr. McCabe:

I want to start by saying that my overall reaction to these proposals is quite positive. They do a very good job of addressing the issues that arise out of the our economy's ever-accelerating change from paper to electronic record-keeping. I have only a few comments and suggestions. I hope some of them are helpful.

1. I would suggest adding two sentences along the following lines at the end of the first full paragraph of the Committee Note to Rule 26(b)(2): "On the other hand, information may be reasonably accessible even though a party does not use the information on a regular basis, or even at all, in the ordinary course of its business. If the information can be retrieved without extraordinary or heroic effort, it is reasonably accessible." This is necessary for balance, as the several preceding sentences have focused on what information is not reasonably accessible. I realize there is something to this effect later on; but it needs to be here in direct juxtaposition to the discussion of what is not reasonably accessible.

2. There is something wrong with the logic of the second paragraph of the Committee Note to 26(b)(2). The

paragraph starts by defining in the first sentence that we are talking about information that IS reasonably accessible. The next sentence purportedly then allows the responding party to designate such information as NOT reasonably accessible. So we are saying that a responding party may designate as not reasonably accessible information that is reasonably accessible, apparently because the information is large in volume. But the volume of the information doesn't affect whether it is accessible or not. Most large corporations have huge volumes of data that they access every day.

I think what we're driving at here is that the court should possibly consider cost shifting or some other limitation where the volume of reasonably accessible information is staggering. If that's so, the Note should say so directly. Or perhaps the topic should be dealt with elsewhere.

3. I applaud as perspicacious and savvy the comment at page 13: "But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information." Don't let anyone talk you into taking that out.

4. I suggest that you delete the quote from the Manual on page 14 to the effect that production of word-processing files with all associated metadata is a "more expensive form of production". I doubt there's a factual foundation for that comment. In fact, I would think production <u>with</u> the associated meta data would be <u>less</u> expensive than production without the metadata. The latter requires the producing party to strip the metadata from the files, which must be more expensive than simply producing the files as is. In any event, you should double check the factual accuracy of that example before you republish and bless it.

5. In the Committee Note to Rule 34(b), I think it would be very helpful to include some examples of the forms of production we are talking about. Many users of the rules will not know about "native format", "metadata", "embedded data",

"pdf files", or the like. Just mentioning some of them in the Note will prompt thinking users to find out what they mean. Please add some examples.

6. Rule 37(f). I favor the rule as drafted, with the negligence threshold. Recklessness is too high. However, it might be good to add a sentence in the Note to say that the Court should consider the degree of culpability in deciding whether to impose a sanction, and its severity.

That's it from me. All in all, a very good job.

Sincerely,

Allen D. Black

cc: The Honorable David F. Levi
The Honorable Lee H. Rosenthal
Edward H. Cooper, Dean
Prof. Richard L. Marcus