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December 27, 2004

04-CV-062
Request To Testify
2/11 DC

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, D.C. 20544

RE: Request to Testify February 11, 2005 Before the Advisory Committee on Civil Rules on the Proposed Changes Regarding Electronic Discovery

Dear Mr. McCabe:

I respectfully request the opportunity to testify before the Advisory Committee on Civil Rules on February 11, 2005 in Washington, D.C. on the proposed changes regarding electronic discovery. I have been asked by Dennis J. Drasco, Chair of the ABA Section of Litigation, to make this request.

The ABA Section of Litigation is in the process of formulating comments on the proposed rule changes and hopes to have these proposals adopted by the ABA House of Delegates as official ABA policy. As you know, individual ABA Sections cannot speak on behalf of the ABA without prior approval. In view of the timing of the last public hearing by the Advisory Committee, the ABA Annual Mid-Year Meeting and the ABA approval process, it is unclear as to whether I will be able to represent that the views I express are official ABA policy. Nevertheless, I will be prepared at that time, at a minimum, to share with the Advisory Committee the ideas being discussed, my personal views and the identity of others who share those views. I will also be submitting detailed written comments prior to the Advisory Committee's deadline of February 15, 2005.

Very truly yours,

JEFFREY J. GREENBAUM
Member of Council
ABA Section of Litigation Liaison to the Advisory Committee on Civil Rules

SECTION OF LITIGATION
American Bar Association

cc: Dennis J. Drasco, Esq., Chair
Daniel G. Dowd, Esq.
Bruce I. Goldstein, Esq.
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Michael P. Lynn, Esq.
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04-CV-062
Testimony
2/11 DC

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January 24, 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, D.C. 20544

Re: Comments to Advisory Committee on Civil Rules on Proposed Changes Regarding Electronic Discovery

Dear Mr. McCabe:

We would like to thank the Advisory Committee for the opportunity to respond to its electronic discovery proposals.

EXECUTIVE SUMMARY

As an initial matter, we believe there is a need to act and support the Advisory Committee's view that electronic discovery presents unique issues that merit specific rule provisions so that guidance can be given to courts, parties and counsel who engage in electronic discovery and so that uniform national standards can be developed. We support the proposals as an excellent effort to address the problems and uncertainties now presented with electronic discovery and offer these suggestions that will make them even better.

1. Electronic Discovery Issues As Part of Early Discovery Planning

We support the proposal that the parties should discuss issues regarding electronic discovery early in the discovery planning process, including the issues of preservation, privilege review and waiver, and form of production, and that agreements of counsel should be incorporated in the Court's initial Rule 16 Order. We seek further clarity in the Advisory Committee Note ("Note") clearly stating that if the parties do not reach agreement on preservation issues, the Court should not routinely enter preservation orders, and that, when entered, preservation orders should be generally directed to preserving data that is reasonably accessible and should be carefully tailored to the specific matters in dispute in the litigation. We urge that the Note make clear that absent agreement of the parties, the court should not encourage litigants to enter into agreements regarding privilege waiver that may have the effect of eroding the attorney-client privilege.

2. *Definition of Electronically Stored Information*

We support the use of the definitional term "electronically stored information" but do not support defining the term separate from the definition of "document." Attorneys have included emails and other electronically stored information in their definition of "document" in Rule 34 document requests for years and we believe the term "document" is broad enough to encompass electronically stored information and it is not necessary for parties to change their practices to now request "documents" and "electronically stored information."

3. *Form of Production*

We support the proposal to permit requestors to specify the form in which they seek to have electronically stored information produced (*e.g.*, paper, or for electronically stored information, the manner in which it is maintained or electronically searchable form) and for the responding party to object to the form, with the court to resolve objections. We go further than the proposal, however, by recommending that the proposal's options (of making an electronic production in the form in which the information is maintained or in an electronically searchable form) be given to the producer in all instances, not just when the requestor fails to specify a form, unless good cause is shown for another form of production.

4. *Privilege Waiver – Procedure For Asserting Privilege After Production*

We support the proposal setting forth a procedure for the court to resolve claims of inadvertent production of privileged information and recommend language improvements to achieve the purpose of preserving the *status quo* when a party realizes it has inadvertently produced privileged information until a court can resolve the issue.

5. *Two-Tiered Discovery – Discovery of Electronically Stored Information that is Not Reasonably Accessible*

We support the proposal for two-tiered discovery for electronically stored information permitting producers to object to the production of electronically stored information that is not reasonably accessible, and requiring good cause for the production of electronically stored information that is not reasonably accessible. We suggest that the Note further define the circumstances when cost shifting should and should not be imposed when a party is required to produce information that is not reasonably accessible.

6. *Safe Harbor From Rule 37 Sanctions*

We support the concept of creating a safe harbor from sanctions for spoliation when a party acts reasonably to preserve electronically stored information but that information is nevertheless lost due to the automatic operation of a party's computer system. We, however, recommend improvements to the safe harbor as follows: (1) the safe harbor should focus on whether a party acted reasonably to preserve electronically stored information that is reasonably accessible, unless a court order required the preservation of information that is not reasonably accessible; and (2) to resolve the issue of the extent of culpability that should be required before sanctions can be imposed, the safe harbor should specify the range of sanctions available for violations occurring due to negligence and for violations due to willful or intentional conduct.

The most extreme sanctions, such as the "adverse inference," should be reserved for willful and intentional spoliation.

INTRODUCTION

As an initial matter, we applaud the Advisory Committee for addressing the unique issues presented by electronic discovery with proposed rule changes. We agree that a consistent set of national standards governing electronic discovery should be adopted. The Advisory Committee has made a strong case for the view that electronic discovery has distinctive features that warrant separate treatment in the Rules. The Advisory Committee has pointed to the exponentially great volume that characterizes electronic data, which makes the form of discovery more burdensome, costly and time consuming, while also holding out the promise of greater precision in ascertaining the facts underlying a dispute. As practitioners, many of us have experienced first hand the additional burden and cost of searching for, gathering, reviewing and producing electronic data as well as the increased impact that electronic evidence, particularly emails, are having on litigation. Ironically, while the intent of the 2000 discovery rule changes was to refocus the scope of discovery so that litigation could be more affordable, the unique problems of electronic discovery have resulted in making discovery more costly. The issue framed by the Advisory Committee is how to permit legitimate discovery while balancing that effort with the increased burden and cost. The Advisory Committee has also noted the dynamic nature of electronically stored information, which can be altered or destroyed automatically, which may be able to be restored after it is "deleted," and which may be stored in places that may be difficult to locate, which exacerbates discovery problems. And yet, we note that new technology, some of which is only now being introduced by companies like Microsoft and Google, permit quick and reliable searches of large data storage devices. Thus, the burden and cost components that are part of any balancing test must be taken into consideration along with whether technology exists that reduces the burden to the responding party.

The Advisory Committee has also recognized the lack of uniformity in developing case law and the fact that discovery rulings are rarely the subject of appellate review as further justification for the need to act. We agree that the proliferation of local rules to address uncertainties faced by parties and litigants is not preferable when the Federal Rules are available to insure consistent procedures throughout the federal courts.

Persons and entities who become parties to litigation should be able to look to consistent national standards rather than the varying requirements of the individual federal districts and other jurisdictions. The Section of Litigation has recognized the need for national standards in this area by recommending amendments to the ABA Civil Discovery Standards regarding Electronic Discovery, adopted in August 2004. But, as noted in the ABA Standards, they do not have the force of law,[1] and uniformity may only be achieved through the Federal Rules.

Our specific comments and recommendations for improvement are set forth below.

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[1] Standard 10, ABA Civil Discovery Standards (August 2004).

SPECIFIC PROPOSALS

I. Discussion of Electronic Discovery Issues As Part of Early Discovery Planning – Rule 26(f), Rule 16(b) and Form 35.

The parties would be required to discuss electronic discovery issues early in the discovery planning process and at the initial Rule 16 Conference. The rule calls for three subjects to be discussed: preserving discoverable information, issues relating to disclosure or discovery of electronically stored information, and privilege review and waiver, including inadvertent privilege waiver and so-called "quick peek" arrangements. The draft Advisory Committee Note ("Note" or "Committee Note") expands the list of discussion items to include the accessibility of any requested information, the burden and cost of reviewing the information and whether some cost allocation is appropriate. Rule 16 would be amended to permit the court to include in an initial scheduling order provisions for disclosure or discovery of electronically stored information and the adoption of any agreement among the parties to protect against inadvertent waiver of privilege.

We believe this basic structure is sound. The theory underlying the initial Rule 16 Conference is that discovery problems are best identified and addressed early and certainly it makes sense to include electronic discovery issues. As noted by the Advisory Committee, the existing rules have not been viewed as adequate by some state and federal district courts, which have promulgated varying state court and local federal rules. A uniform federal rule is appropriate. We do, however, have concerns regarding the subjects of preservation and privilege waiver that may be able to be appropriately addressed in the Committee Note.

A. Preservation.

The question of what electronic data to preserve at the beginning of a case (or possibly earlier when litigation has been threatened or appears likely) is extremely difficult, particularly for information that may be deleted by the routine operation of a party's electronic data system. It is also difficult because of the limited knowledge the litigants and courts may have of the storage systems and technology in a given case. The Advisory Committee's draft Note urges the parties to discuss these issues, but it does not provide enough clear guidance. It states that the parties should balance "the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business," but that "wholesale or broad suspension of the ordinary operation of computer disaster recovery systems, in particular, is rarely warranted."

Neither the Rule nor the Note provides guidance as to how to resolve these questions if the parties do not reach agreement at the early planning stage on the appropriate scope of preservation. More clarity should be provided. Rule 16 invites the court to address these issues at this early stage when no specific discovery requests are pending and the court may not have enough information about the impact or cost of a broad early preservation order. The Note cites the *Manual for Complex Litigation* (4th) § 11.422, recognizing that blanket preservation orders may be prohibitively expensive and unduly burdensome. Broad or vague preservation orders may also be difficult to carry out and may serve as a trap for subsequent sanctions motions when

spoliation claims are made years later with the clarity of hindsight,[2] while preservation orders that are too narrow may permit the destruction of key evidence.

Recent case law focusing on sanctions for failing to preserve electronically stored information (*e.g., Zubulake v. UBS Warburg LLC*, 2004 WL 1620866 (S.D.N.Y. 2004)) has led to posturing by parties to set up later claims of spoliation. For example, some counsel seem to have adopted a practice of sending the other side a letter early in the action, when motions to dismiss are pending and before any Rule 16 conference had been scheduled, placing opposing counsel on notice that electronically stored information would be sought and that the adverse party had an "obligation to discontinue all data destruction and back up tape recycling policies." While such an overbroad request may not be consistent with applicable standards, these counsel may be attempting to set up a later claim for spoliation should documents later be no longer available as a result of a party's refusal to completely suspend the ordinary operation of its computer disaster recovery system.

We are not asking the Advisory Committee to define the scope of the parties' preservation obligations, a subject previously not the subject of any rule, and one that might be beyond the reach of the Rules Enabling Act. As noted in the Preservation Standard in the ABA Civil Discovery Standards, the duty to produce may be, but is not necessarily co-extensive with the duty to preserve (Standard 10, ABA Civil Discovery Standards). The Note or Rule could, however, cross reference what may be required to be disclosed or produced by parties in the first instance (that which is "reasonably accessible"), a proper subject for the discovery rules. Thus, the Note could clearly state that a party has no obligation to preserve electronically stored information that is not reasonably accessible unless a court so orders for good cause.

The Note should also indicate that preservation orders should not be routinely included in Rule 16 orders any time there is a disagreement over the proper scope of preservation. Discovery in the first instance is managed by the parties; it is their obligation to make their initial disclosures, to propound reasonable discovery requests and to respond appropriately to them without court orders entered in a vacuum. The court may wish to get a better feel for the issues in dispute, and address the issues later in the context of specific discovery requests. In some instances, the court may wish to defer issuing a preservation order until limited factual discovery of the technological limitations and advantages which may prove useful to the court in fashioning an appropriate order. As discussed elsewhere in the Notes, the availability of particular documents on the party's active computer system may obviate the need to preserve back up data that is not reasonable accessible. The Note should discourage *ex parte* preservation

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[2] For example, in *United States v. Philip Morris USA, Inc.*, 327 F.Supp.2d 21 (D.D.C. 2004), the court issued sanctions of $2.75 million for the destruction of emails that violated a routinely issued Case Management Order No. 1, which required the preservation of:

> all documents and other records containing information which could be potentially relevant to the subject matter of this litigation.

327 F.Supp.2d at 23. Without opining on whether the specific conduct found by the court in that case merited sanctions, we believe generalized "preserve all relevant documents" orders should not be routinely issued nor serve as a basis for subsequent sanctions motions.

orders, or the entry of broad or generalized ones, and specify that any preservation orders should be carefully tailored to specific items that can be identified with particularity.

B. Privilege Waiver.

The rule seeks to address two types of agreements regarding waiver of the attorney-client privilege. The first addresses common agreements where counsel agree that, if they mistakenly produce privileged documents, they may seasonably notify the other party when they discover the mistake, the documents will be returned and the inadvertent production will not be deemed a waiver.

The risks of inadvertent production of privileged information are greater with electronically stored information because of the greater quantities of documents that may need to be reviewed. It therefore makes sense to include the parties' voluntary agreements on this subject in the initial Rule 16 order. Although those kinds of agreements are binding on the parties, it is unclear whether any inadvertent production, notwithstanding such an arrangement, may nevertheless be deemed a waiver as to a third party who seeks the documents in another proceeding, particularly in a state or administrative proceeding. The existence of a court order blessing the parties' agreement may give them some additional protection and facilitate the exchange of discoverable information. The Note should, however, make clear that even if embodied in a court order, the parties' non-waiver agreement may not protect them from claims of waiver by third parties in a different proceeding. The Note should also emphasize that a court should not impose a non-waiver agreement without the parties' consent.

These comments also apply to the "quick peek." Under this arrangement, a party permits the opposing party to have access to documents before performing a privilege review, with the understanding that a later privilege review will be performed only on the documents tagged for production and the opposing party's initial access or "quick peek" will not be deemed a waiver.

Although we believe parties should have the right to try these kinds of agreements, we do not know how many parties are willing to allow their adversaries to review electronically stored information that may contain privileged information without performing an initial privilege review. If they do so, they should recognize that the production of privileged information may not be deemed inadvertent, and there may be a greater chance that the production will be deemed a waiver in some jurisdictions.

While we fully support efforts to further protect parties who are willing to experiment with novel approaches to privilege review, because of the importance of the attorney-client privilege, we do not support any suggestion that courts may properly encourage parties to adopt such agreements when the full extent of the potential effects of such an order are so unclear. The Note should therefore make clear that a court should not pressure the parties to agree to those arrangements that could result in the loss of the attorney-client privilege.

II. Definition of Electronically Stored Information – Rule 34.

The Committee has adopted the broad term "electronically stored information" in lieu of either another definition or the laundry list approach used in the ABA Civil Discovery Standards related to electronic discovery. We support the flexibility of a broad definition in the federal discovery rules. We do not support the insertion of "Electronically Stored Information" in the

heading and text of Rule 34 as a concept separate from a "document." While we agree that discovery of electronically stored information presents unique issues regarding discovery that merit provisions in the rules addressing them, we do not agree that the term "document" is not broad enough to include electronically stored information. Many practitioners' definition of a "document" in Rule 34 requests routinely include "emails" and information in data bases. The proposed change would require them to modify their document requests to now ask for the production of both "documents" and "electronically stored information." The term "document" is broad enough to include electronically stored information. Parties could still specify if they do not want electronically stored information; those who do want it should make clear that they do so. At a time when a high percentage of business and even personal communication is in electronic form, a party should not be able to avoid producing this information simply because the request did not specifically identify it.

III. Form of Production.

A responding party now has certain choices on how it may produce requested information. Documents may be produced in the form they were maintained or in response to particular requests. Parties have pointed out the undue burden when electronic information is produced in one form, only to have the requesting party ask that it be produced in another (*e.g.*, electronic vs. paper). The Committee grappled with questions of who gets to decide the form of production, whether the form of production must be specified by the requesting party, and what choices are available to the responding party.

The proposed change would therefore modify Rule 34 to permit, but not require, a requesting party to specify the form in which electronically stored information is to be produced (hard copy, electronically searchable form, the form it is normally kept, native format, etc.), and to permit the responding party to object to the requested form. If the request did not specify the form of production, the responding party would have the choice of producing the information in the form of which it is ordinarily maintained or in an electronically searchable form. If an objection were made to the form of production the court would resolve the dispute. Absent a court order or a party agreement, a party would need to produce the requested information only in one form.

We believe the proposal to provide the responding party with several choices is sound and consistent with the historical approach of Rule 34. The Committee's approach, however, raises several additional issues. First, the Rule provides the responding party with two choices for the form of production only if a form is not specified by the requesting party. We believe the responding party should always have this choice in the first instance, consistent with current practice, and that the burden should be on the requesting party to specify why another form should be required.

Second, the two most controversial issues presented by the proposal are whether responding parties should be required to produce documents in native format and whether metadata and embedded data should be required to be produced. As an initial matter, one problem with production of electronic information in native format is that it is easily altered and it may be difficult to establish the precise content of the "document" at the time it was produced.

A more difficult issue was discussed by the attendees at the Advisory Committee's Electronic Discovery Conference: when and whether metadata and embedded data should be

required to be produced. Metadata, containing information about the document and its creation, may some times be relevant, but many times it will not. Its production will increase file size and add to the burden of review on both sides. The problem is compounded with the production of embedded data that may show tracks of prior drafts and notations of various authors. But there are also advantages to the production of this information in particular cases, for example, in the same manner that prior drafts of agreements may be relevant to establishing intent of the parties. But routine production of this information will add to the burden of privilege review, the creation of privilege logs and generally increase cost without necessarily having any corresponding benefit. Although we believe a party should be able to ask for this information, the default should exclude it and the requesting party should be required to show what is needed and why it is needed in the particular case. In some cases, limited discovery should be permitted to provide a factual basis for the required showing.

The option of producing in electronically searchable form would probably lead to a common practice or default in which documents are produced in a searchable electronic form. Other types of electronic documents may not be electronically searchable, such as photographs or documents stored in .jpg or .mpg form, and these should be produced in the form they are maintained.

In summary, although a requesting party should be able to specify whether it desires paper or electronic production, consistent with the current structure of the rules, a responding party should have a choice in the form of electronic production (the form maintained or electronically searchable form) unless good cause is shown as to why that choice is not appropriate.

IV. Privilege Waiver: Procedure for Asserting Privilege after Production.

Although the issue of inadvertent production of privileged information is not limited to the production of electronically stored information, we agree that problems in this area are intensified with the production of large volumes of electronic information. As stated earlier, we agree that the parties should discuss whether the court should enter an order on consent regarding inadvertent production as part of the initial case management order. We also agree with the procedure set forth in proposed Rule 26(b)(5) for the parties to have claims of inadvertent production presented to the court for determination. Three questions, however, are presented by the proposal.

A. "Within a Reasonable Time"

The first relates to the phrase "within a reasonable time." As drafted, the proposal specifies:

> When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege.

The notified party must then take certain actions specified in the Rule until the matter can be resolved by the court.

"Reasonable time" should probably refer to a reasonable time from when the party learns, or reasonably should have learned, that the inadvertent production has been made, rather than from the actual production, as currently suggested by the rule. In a large document case, a party may make a document production and not recognize until several years later, for example, when preparing for depositions, that a mistake has been made. Although a court may ultimately determine that, in the totality of the circumstances, notice was seasonably made, it may not be deemed "within a reasonable time" of the actual production.

B. Applicable Factors

The second question raised by the proposal is whether the Rule or Note should provide more guidance on the factors to be used to resolve claims of inadvertent production of privileged information. Since rules help foster consistency and have an education function, an elaboration of the factors that a court should consider in resolving these issues may move towards greater uniformity. We recognize, however, that the Committee may very well leave these factors out in recognition of the substantive nature of claims of waiver.

C. Certification

Third, the Advisory Committee has asked whether a party notified that privileged material has been inadvertently produced should be required to certify that the privileged information has been sequestered or destroyed if it is not returned. We believe there should be some requirement to acknowledge that these steps have been taken, but that a certification should not be required. A written confirmation or acknowledgment would be sufficient. The requesting party's mistake should not lead to imposing the burden of a formal certification upon the notified party. It is not unreasonable, however, to acknowledge by letter that the requested steps have been taken. A party should be able to rely on counsel's acknowledgement for comfort that the *status quo* will be preserved until the court can resolve the issue.

V. Two-Tiered Discovery: Discovery of Electronically Stored Information that is Not Reasonably Accessible.

We strongly support the proposed two-tiered structure (a) permitting discovery without a court order of electronically stored information that is "reasonably accessible" to the responding party and (b) requiring a court order before the party may require production of electronically stored information that is not reasonably accessible.

This two-tiered structure is consistent with the 2000 amendments to Rule 26 that reflect an effort to limit the burden of discovery by adopting two tiers for the scope of discovery: (i) tier one managed by the parties (documents relevant to the claims and defenses of the parties) and (ii) tier two (broader discovery accessible only by court order). The proposed two tier structure for electronically stored information is justified by the burden and expense of searching back-up tapes and disaster recovery systems.

The Committee has asked whether more explanation should be given in the Note about the phrase "reasonably accessible." We believe further explanation would be appropriate. "Reasonably accessible" should mean active data and information stored in a manner that anticipates future business use and efficient searching and retrieval. It should not include disaster recovery back-up tapes that are not indexed or regularly accessed by the responding

party. Nor should it include legacy data or data that have been deleted and may only be restored through forensic techniques.

The Committee has also asked whether the Note provides sufficient guidance on the proper limits of electronic discovery and on the conditions courts may or should impose in permitting access to inaccessible data. We also believe that more guidance should be provided. Although the Rule provides that, if a party establishes good cause for the discovery of inaccessible electronically stored information, the court may specify the conditions for this discovery, the Rule and the Note do not give sufficient attention to when cost shifting should be imposed to require a party to incur the expense of seeking to access information that is otherwise not reasonably accessible. Recent cases have addressed these questions, but more elaboration may be appropriate in the Note on when parties should be required to go through the burden of producing electronically stored information that is not reasonably accessible and when the burden of that expense should be imposed on the requesting party.

Further attention also might be given to the term "identify" in the proposed rule. As drafted, a party need not produce electronically stored information that it "identifies" as not reasonably accessible. This raises the issue of what a party must do to identify information that is "not reasonably accessible." Our view is that a party should be able to object to the production of electronically stored information that is not reasonably accessible and specify what is being produced. The requesting party would then determine whether to move to compel the production of the information that is not reasonably accessible. The word "identify," however, should not require a party to specify every type of disaster recovery system, legacy data or deleted information that it believes is not reasonably accessible, although in some cases discovery as to what may be available may be permitted. To eliminate confusion, the Rule could be revised to eliminate the word "identify," without changing its substance, to provide that "a party need not provide discovery of electronically stored information that is not reasonably accessible."

Finally, as discussed below, the preservation obligation and the safe harbor should be harmonized with the two-tiered electronic discovery structure.

VI. Safe Harbor from Rule 37 Sanctions.

The Advisory Committee has recognized that the production of electronically stored information presents unique issues of spoliation, particularly when a party's routine operation of its electronic information system results in the destruction of what might otherwise be relevant to the litigation. We agree that the concept of a safe harbor is a useful one to provide protection when electronically stored information is lost because of the routine operation of a party's data storage system. We are concerned, however, that the proposed safe harbor does not provide enough protection or sufficiently address legitimate concerns raised by these problems.

As drafted, the safe harbor does not apply if the party violated an order issued in the action requiring it to preserve electronically stored information or if the party failed to take reasonable steps to preserve the information after it knew or should have known the information was discoverable. The proposal has been criticized for permitting sanctions to be imposed for simple negligence, with the suggestion that there should be an intentional or reckless standard as a predicate for sanctions. The Committee has therefore published an alternative in a footnote that uses this standard. That version, however, also contains an exception for violation of a court order.

We note that the safe harbor proposal has already generated many comments and will need a close examination. While additional comments could be offered by us, at this time we wish to address two points in particular.

A. Insufficient Guidance as to Protected Conduct

The current formulation of the safe harbor –whether "the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action" – provides insufficient guidance to parties seeking to comply with their discovery obligations. This standard will always be applied using 20/20 hindsight. More of a bright line should be established to provide for a meaningful safe harbor. This could be accomplished by adopting the same two-tiered structure discussed above that protects a party that has taken "reasonable steps to preserve reasonably accessible electronically stored information after it knew or should have known the information was discoverable in the action." By the same token, if a party obtained a court order requiring the production of electronically stored information that was not reasonably accessible, to invoke the safe harbor the party would need to establish that it took reasonable steps to preserve that information after the issuance of the court order.

B. Level of Culpability

The debate over the level of culpability that should be required before the imposition of sanctions – namely, whether negligent conduct is sufficient or intentional or reckless conduct should be established – could be resolved by specifying the remedies that courts could impose for each type of conduct. Corporations are alarmed over the prospect that severe sanctions, such as a devastating "adverse inference," – or even worse, such as striking defenses – could be imposed as a result of merely negligent loss of data through the automatic operation of computer back-up systems. A negligent loss of electronic information on a company's active computer system may well justify a need to search back-up tapes that may otherwise not be required to be searched. It should not ordinarily be the basis for an adverse inference. The Note should specify the range of sanctions available for violations occurring due to negligence and those available for violations due to intentional and willful spoliation. The most extreme sanctions, such as an adverse inference or worse, should not be imposed absent intentional and willful spoliation.

CONCLUSION

The Committee's proposed amendments are an excellent first step in addressing the unique problems faced by parties, practitioners and the courts in dealing with electronic discovery. Our comments in large part are intended to provide some additional guidance on these issues. We look forward to providing any further assistance the Advisory Committee may ask for as it moves forward with its proposed Rule changes.

Very truly yours,

Dennis J. Drasco[3]
Brad D. Brian
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Hon. Joseph A. Greenaway
Jeffrey J. Greenbaum
Russell Hardin, Jr.
Craig C. Martin
James D. Masterman
Stephen D. Susman
Irwin H. Warren

[3] Mr. Drasco and the other persons listed in the column following his name are officers and members of the Council of the Section of Litigation of the American Bar Association. Mr. Dowd and the other persons listed in the column following his name are members of the Section's Federal Practice Task Force. We are submitting our comments in our individual capacities and they have not been approved by the ABA or reflect ABA policy.