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February 7, 2005

Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure before the Judicial Conference Committee on Rules and Procedure

Dear Hon. Secretary:

I am writing to share The Chicago Bar Association's comments on amendments to the Federal Rules of Civil Procedure proposed by the Advisory Committee on Civil Rules to the Judicial Conference Committee on Rules and Procedure.

The CBA feels that federal discovery procedures should be reviewed in light of the rapidly evolving importance of electronically stored information in the discovery process. It favors the adoption of a uniform national standard for handling these issues, and disfavors the rise of local rules imposing procedures that differ by venue. With these principles in mind, the CBA believes that the currently proposed amendments to the rules are a good first effort, but seem to be based on outmoded conclusions about information systems. In particular, the CBA has two specific objections to the proposed amendments.

First, "electronically stored information" should not be defined separately from the term "documents." The CBA feels that the current definition of documents is sufficiently broad and flexible to make the addition of a new concept for "electronically stored information" unnecessary. For example, the term "documents" was adequate to address information storage formats that were not in existence when the rules were adopted, such as CD-ROMs and other electronic storage media. Thus, the CBA subscribes to the old adage "if it ain't broke, don't fix it." Indeed, the creation of a new category of discovery for "electronically stored information" will create a short-term dislocation among practitioners as they adjust their discovery practices to deal with the new definitions. Also, despite efforts to ensure that the rules account for this new category, the creation of this new category may still have unintended consequences in other rules that were originally written without the new category in mind.

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Moreover, some of members of the CBA believe that this proposal has, at its heart, an incorrect premise, namely, that electronically stored information presents a more difficult storage media from which to locate and retrieve data. If anything, electronically stored data is often easier to retrieve, search and sift, contrasted with the actual physical challenges to dealing with documents in paper format, located in warehouses of "bankers boxes" stored in uncontrolled environments, coupled with the vast attorney hours to study their content. Often, even without the proposed rule change, attorneys efficiently study and exchange traditional documents by first digitizing them.

Second, the Judicial Conference's proposed safe harbor for the inadvertent destruction of electronically stored information seems to focus on a problem that does not exist. Existing case law already protects innocents from sanctions for the truly inadvertent and unavoidable destruction of documents, electronic or otherwise. The CBA is not convinced that excuses for the destruction of electronically stored information should be treated differently.

Additionally, the creation of a rule that statutorily defines a safe harbor for the destruction of evidence creates opportunities for mischief. In one of our member's words, the electronic document destruction "safe harbor," while perhaps well-intended, is akin to encouraging the breeding of dogs to eat homework assignments.

Overall, the CBA applauds the Judicial Conference's attempts to create rules to deal with electronically stored data, but feels that the current proposals need further refinement. Please feel free to contact Ian H. Fisher, Chair of our Federal Civil Procedure Committee, if you have any questions regarding our report. Mr. Fisher can be reached at 312-701-9316 or e-mail fisher@sw.com. Thank you for your consideration.

Sincerely,


Joy V. Cunningham
President

cc: Terrence M. Murphy, Executive Director
Ian H. Fisher, Chair, Federal Civil Procedure Committee