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November 30, 2004

Peter G. McCabe, Secretary of the
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rules of Civil Procedure Regarding Discovery of Electronically Stored Information

Dear Mr. McCabe:

On behalf of the Philadelphia Bar Association, I am submitting the enclosed comments to the proposed amendments regarding discovery of electronically stored information. A copy of the resolution by which they were officially adopted by our Board of Governors also is enclosed. As Chair of the Federal Courts Committee, I have been asked to send the comments to you for consideration by the Committee on Rules of Practice and Procedure.

If I can be of any further assistance regarding this process, please feel free to let me know.

Very truly yours,

Rudolph Garcia

bcc: Gabriel L.I. Bevilacqua, Chancellor
Areetha M. Carter, Staff Counsel

Philadelphia Bar Association Comments and Input
on Proposed Amendments to Federal Rules of Civil Procedure
Governing Discovery of Electronically Stored Information

Preamble

The Philadelphia Bar Association believes that, on the whole, the proposed amendments are a welcome step forward in addressing important issues regarding discovery of electronically stored information. However, we suggest the following modifications.

Input and Comments

I. Early Attention to Issues Relating to Electronic Discovery

A. Rule 26(f)

We endorse most of the proposed changes to Rule 26(f), but disagree with the inclusion of proposed Rule 26(f)(4), which would require the discovery planning conference to cover "whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information," because:

1. That provision may lull parties into a false sense of security with respect to production of privileged information under "quick-peek" and "claw-back" arrangements, given that the law is unsettled as to whether such orders bind nonparties or subsequent parties who later contend that the privilege has been waived;

2. The order may prove to be too restrictive later in the life of the case; and

3. The issue can be addressed at a later date and under the other Rule amendments.

B. Rule 16

We endorse the proposed amendments to Rule 16.

II. Discovery of Electronically Stored Information That Is Not Reasonably Accessible

A. Rule 26(b)(2)

1. We endorse the proposed amendment to Rule 26(b)(2), but believe that some minor revisions to the Committee Note following the rule would greatly improve its clarity.

(a) In the ninth paragraph of the proposed Note, it would be preferable to number the "examples" of terms and conditions that a court might impose as follows:

> The rule recognizes that, as with any discovery, the court may impose appropriate terms and conditions. Examples include: (a) sampling electronically stored information to gauge the likelihood that relevant information will be obtained, the importance of that information, and the burdens and costs of production; (b) limits on the amount of information to be produced; and (c) provisions regarding the cost of production.

Without that change, "the importance of that information, and the burdens and costs of production" may be misinterpreted as independent examples, rather than purposes of the suggested sampling.

(b) The order of the ninth and tenth paragraphs should be reversed to conform to the sequence in which the topics they address are dealt with in the Rule. Because the ninth paragraph sets forth the types of "terms and conditions" that a court might impose if electronic discovery is permitted, it also more logically belongs after the tenth paragraph, which deals with whether there is good cause to permit such discovery in the first place.

2. We also considered whether the phrase "electronically stored information" should be deleted from the proposed amendment so that it would apply to *all* discovery of inaccessible information. Such a change would be consistent with the changes discussed in Section IV below regarding Rule 34, which treat electronic discovery like any other form of document discovery. However, we rejected that approach because, in the context of addressing the problem of reasonable access, electronic information is unique both in its form and in its sheer volume (thereby warranting separate treatment), and remedies for burdensome paper discovery are adequately addressed in the existing rules. In other words, while we generally believe that electronically stored information should be treated as a type of "document" that is subject to the same rules as other documents, its unique character also requires supplemental rules where appropriate. Rule 26(b)(2) is such a supplemental rule.

3. We also considered whether the factors articulated in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002), and similar cases should be codified in the Rule or enumerated in the Committee Note. However, we ultimately decided that such factors are better left to the courts and that the citation of some of those cases in the Committee Note was sufficient. We also considered whether such factors should be applied not only

to the cost-shifting analysis but also to the threshold inquiry of whether the requested electronic discovery should be permitted at all. We also rejected that option on the ground that the existing language in Rule 26(b)(2)[1] is adequate to incorporate those factors.

III. Assertion of Privilege After Production

A. Rule 26(b)(5)(B)

1. We endorse the proposed amendment to Rule 26(b)(5)(B) as currently drafted, which specifies a procedure for implementing "quick-peek" and "claw-back" agreements but leaves the substantive waiver issues to the applicable case law.

2. We believe, however, that it would be preferable to require a party that receives notice of an inadvertent production of privileged information to certify that the information has been sequestered or destroyed in the event that the information is not returned to the producing party. That would avoid uncertainty and potential litigation regarding the status of whatever privileged information was produced. We suggest that such a certification be permitted to be made in any reasonable form of written communication, to make it clear that a formal court filing is not required.

IV. Application of Rules 33 and 34 to Electronically Stored Information

A. Rule 33

We endorse the proposed expansion of the definition of the term "business records" to include "electronically stored information."

B. Rule 34

1. We disagree with the proposed amendment to Rule 34 insofar as it would provide that "electronically stored information" is not a type of "document."

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[1] Even without the amended language, Rule 26(b)(2) provides:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) 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. . . .

(a) Such a structure might be interpreted to require parties to make separate or specific requests for the production of electronically stored information as opposed to "documents." Rather than solving a problem, the proposed change could cause confusion and increase, rather than decrease, the number of discovery disputes.

(b) Further, treating "documents" and "electronically stored information" as mutually exclusive could lead parties to treat these two forms of information differently with respect to preservation and other matters, which also would be undesirable.

(c) The Committee Note is confusing in this regard. On the one hand, it acknowledges that the proposed change would separate "electronically stored information" from "documents." On the other, it states that a request for production of documents "should be understood to include electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and 'documents.'"

2. For the reasons stated above, it would be better to define documents to *include* "electronically stored information" as was done with respect to "business records" in Rule 33.

(a) Specifically, Rule 34(a) would begin as follows: "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, test or sample any designated documents (including but not limited to electronically stored information, writings, drawings . . . ."

(b) The Committee Note also should be revised to say: "This change clarifies that the term 'document' includes electronically stored information."

3. We have formed no consensus with respect to the proposed changes relating to the form of production of electronically stored information. We note that the proposal is consistent with current practice—it places emphasis on the parties' ability to agree to a form of production, and ultimate authority to decide on the form of production rests with the Court. However, some believe that the information should be produced in the form in which it is ordinarily maintained *only* if that form is readable by the requesting party. This concern arises from the possibility that certain electronic information may only be readable if viewed with proprietary software, or obsolete hardware, or through some other technology available only to the producing party. Others believe it is already implicit in the rules that a production that cannot be read it is not an adequate response to a discovery request.

4. The Committee Note to Rule 34 should state, as it does in Rule 33, that "satisfying these provisions . . . may require the responding party to provide some combination of technical support, information on application software, access to the pertinent computer system or other assistance. The key question is whether such support enables the [requesting] party to use the electronically stored information as readily as the responding party." In either event, the two notes should be consistent, setting forth such language in both, or eliminating the language from both.

V. Limit on Sanctions for Loss of Electronically Stored Information

A. Rule 37

1. We disagree with the proposed amendments to Rule 37. The current rules and case law regarding spoliation adequately addresses any issues that may arise regarding a failure to preserve electronically stored information.

2. We also believe that the use of phrase "should have known" is confusing and unclear in the context of this proposed amendment.

3. We also disagree with the suggested alternative, which would protect parties from sanctions absent "reckless" conduct. As a matter of public policy, parties should not be given a license to be negligent.

VI. Subpoenas for Electronically Stored Information

A. Rule 45

In conformity with our recommendations above concerning Rule 34, we suggest revising the proposed amendments to Rules 45(a)(1)(C) and 45(c)(2)(A) to treat electronically stored information as a type of document, not as a separate category of information subject to subpoena.

RESOLUTION APPROVING COMMENTS TO PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION

WHEREAS, proposed amendments to the Federal Rules of Civil Procedure regarding discovery of electronically stored information were published for comment in August 2004 by the Civil Rules Advisory Committee to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States;

WHEREAS, the deadline for submission of comments on the proposed amendments is February 15, 2005;

WHEREAS, the Federal Courts Committee of the Philadelphia Bar Association formed an *ad hoc* subcommittee of 22 lawyers and judges to review and analyze the proposed amendments;

WHEREAS, the subcommittee held numerous meetings to consider the proposed amendments and prepared a written report recommending appropriate comments;

WHEREAS, the subcommittee's report was circulated to the full Federal Courts Committee twice by email and twice on paper, was discussed at two of the committee's monthly meetings, and was unanimously approved for submission to the Board of Governors at the committee's meeting on November 17, 2004;

WHEREAS, the recommendations have been duly submitted to the Board of Governors for its consideration; and

WHEREAS, the Board believes it is in the best interests of the association to submit the recommended comments to the Civil Rules Advisory Committee;

NOW, THEREFORE BE IT RESOLVED, as follows:

1. The Federal Courts Committee's recommended comments to the proposed amendments to the Federal Rules of Civil Procedure regarding discovery of electronically stored information are hereby adopted as comments of the Philadelphia Bar Association; and

2. The Chancellor shall submit the comments to the Civil Rules Advisory Committee on behalf of the association.

PHILADELPHIA BAR ASSOCIATION
BOARD OF GOVERNORS
ADOPTED: November 23, 2004