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Subject Comments on Proposed Civil Rules

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Attached are my comments dated January 14, 2005, relating to the proposed civil rules on electronic discovery.

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Comments on Proposed Electronic Discover Rules.doc

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COMMENTS OF ALAN B. MORRISON
REGARDING PROPOSED ELECTRONIC DISCOVERY RULES

I am a senior lecturer at Stanford Law School. Before joining the faculty last fall, I was for 32 years with the Public Citizen Litigation Group in Washington D.C. and before that an Assistant U.S. Attorney in the Southern District of New York, doing mainly civil cases. In most of my cases I have represented plaintiffs, often against the federal government or large corporations. While the cases in which I was involved have not involved particularly heavy discovery, there has been enough of it for me to appreciate the problems that the proposed rules seek to resolve. I also attended the two day program on this topic at Fordham Law School and have been involved in similar programs and submitted comments on other discovery proposals over the years. These comments reflect only my own views, and I have chosen to comment only on selected issues where I hope that I have something different to offer.

Terminology: The Committee correctly recognizes the problems with using the term "document" to cover electronic information: the fit is awkward, at best. A rule change solely for that reason would probably not be worth the effort, but as part of a larger rule change, it makes sense to amend the Rules to make them clearer. Rule 34(a)(1) – one place where the change appears – uses "electronically stored information," which seems accurate enough, but rather long and awkward. It also runs the risk of some day becoming out-moded when some new method of storing information is invented.

There is a perfectly good term that could be used and would shorten, rather than expand, the Rules: "record." Unless something is recorded, in some way or other, it

cannot be produced or inspected or tested or sampled, or in any way used in litigation. The term record would include documents, photographs, tape recordings, CDs, computer tapes, hard drives, and anything else that any party might want to examine and discover. Using that word would reduce, if not eliminate, the likelihood of obsolescence, and it would also bring the Rules in line with other federal laws that use the term records, such as the Freedom of Information Act, the Federal Records Act, and the Presidential Records Act. Common usage would lessen the chance that some clever lawyer would make an argument that the different term in the Rules, as compared to these and other statutes, meant that someone did not intend the same result in the different contexts.

As we all know, lawyers have a very bad tendency to use many words when one or a few will suffice. The Committee has a chance to strike a minor blow for brevity and clarity by using "record" to replace the existing list of types of records and to avoid adding a new one – electronically stored information – to the list.

Inadvertently Produced Privileged Records: The Committee has concluded that discovery of electronic records increases the chances that privileged materials will be inadvertently produced to the other side. An argument can be made that the ability to search electronic records using key words and names of key personnel (such as lawyers) makes it less, rather than more, likely that such mistakes will occur. Regardless of which is correct, the idea of dealing with situations of his kind makes sense, whether electronic records are unique or not.

Since most of the privileges claimed are state law based (except perhaps those that the United States might invoke), I agree that the Rules cannot alter those privileges. That surely means that, if an inadvertent production of attorney-client materials would

not constitute a waiver under state law, the federal courts could not allow such material to be admitted in evidence at trial. But it is by no means certain that, as part of their authority to manage civil discovery, district courts could not rule that once a document is produced, it need not be returned, no matter what state law says, because the federal rules allow federal courts to control discovery, and nothing in the *Erie* doctrine or 28 USC 1652 (the Rules of Decision Act) or 28 USC 2071-77 (the Rules Enabling Act) is to the contrary. That material might still have to be precluded from being offered in evidence or at trial, but it need not be returned and the receiving party told to forget about having read it, once it has been turned over in discovery.

It could sensibly be argued that the interests of the federal courts in handling discovery and avoiding messy disputes about inadvertent disclosures outweighs any interest the state has in enforcing its non-waiver rules outside its own courts. Even if a document is ordered returned, the bell can't be "unrung" for the lawyer who has seen it, which makes the whole exercise seem of dubious necessity. Interestingly, when this problem was raised at the Fordham conference, no one was able to point to a single case in which there had been an inadvertent production of a document that was both significant (and not merely cumulative) and privileged. There seem to be two reasons for that: the obviously privileged records (such as a memo from counsel to the client) do not get turned over by mistake, and most documents that are produced (whether privileged or not) are not all that significant, partially because most civil cases never go to trial. It may be that there are reasons of comity and a desire not to stir up too much controversy that would lead the Committee to propose a rule that a document produced in discovery need never be returned (although its uses may be limited). Nonetheless, many of the reasons

to take that position suggest that, if there are problems with the approach that proposed Rule 26(b)(5)(B) takes, they are not as serious as some may suggest and hence not be worth a complicated fix.

There are some questions that the current draft of Rule 26(b)(5)(B) raises. The concept of timely notification to the other side is difficult to grasp and apply. The reasonable time requirement appears to apply to the producing party, yet it seems highly unlikely that a defendant that delivers vast quantities of electronic records is going to review them after production rather than before. In the ordinary course, once production takes place, the records would not be examined again absent some need to use them, or because some action by the other side caused the defendant to look at a particular record and realize that it had been inadvertently produced. Thus, at least in most cases, the time of discovery of the mistake is unlikely to be very soon, which appears to work seriously against the producing party under the proposed Rule. It is not that time should have nothing to do with the issue, but that it seems preferable to measure reasonable time from discovery of the mistake to taking action, rather than from the time of errant production.

The Rule does not expressly forbid the party that receives the allegedly privileged material from "using" it in the litigation, pending the resolution of the claim of privilege. Some uses, such as in support of a motion for summary judgment, or to cross-examine a witness at a deposition, would seem inconsistent with the spirit of the proposed Rule, and to prohibit them would cause no problem that cannot be cured by allowing later use of the record if the privilege is found to be inapplicable or waived. But other uses should not be attempted to be barred. For example, if counsel learns from a memo that opposing counsel is worried about how good a certain witness will be on the stand, how can that

fact ever not be "used" in some sense of the word? Or, if the producing party seeks to recover the document as privileged, can the receiving party "use" the contents to rebut that claim? In my experience, both with documents in litigation claimed to be privileged, and in the comparable areas of allegedly exempt documents under the Freedom of Information Act, parties resisting disclosure often stretch the privilege considerably and vastly overstate the harm that could result from it being released. Allowing the receiving party to quote from the document (under seal) would tend to reduce the number of claims of privilege and would result in courts rejecting more claims of privilege than under current law where the opposing party has to fight largely in the dark. There is, in my view, no need for the Committee to add a provision dealing with the interim use of allegedly privileged documents, both because the most serious uses can be prevented without a new Rule, and the others are almost impossible to control (clearing information from your mind) or should not be barred (responding to a motion to reclaim the records).

There is one other matter not covered in the Rule, and appropriately so. The Rule does not impose any obligation on the part of the receiving party to inform the producer that privileged or arguably privileged material has been (inadvertently) produced. There should not be such a Rule because the receiving party should not have to assume that any production was inadvertent, or that if there are arguably privileged materials, opposing counsel decided not to assert any possible claims. Obligating a receiving party to inform the producer would likely to lead to motions for failure to do so, in which the issues would include who actually looked at each particular document, how obvious (or not) was the claim of privilege, and what defenses were there to such a claim that would enable the receiving party to argue that the obligation was not triggered. The battles

fought over the 1983 version of Rule 11 come to mind, and they were a major reason why the Rule was changed in 1993.

Safe Harbor: A number of participants at the Fordham conference expressed the need for a safe harbor to enable defendants to avoid sanctions in cases in which the routine operation of a business, for example, where backup tapes were over-ridden daily, caused certain evidence to be destroyed. Once a motion has been made to preserve, which specifies the records that cannot be routinely destroyed, there is no need for a safe harbor since the party should act to prevent destruction until the court rules. And if the burden of even that short-term preservation is significant, relief can always be sought from the court.

But safe harbor proponents want more. They would like a total safe harbor until there is either a specific request or a court order. But whatever powers there exist under the Rules Enabling Act, they do not extend to regulating pre-litigation conduct. Thus, the earliest any Rule-based immunity can start is the day the complaint is filed, although it is conceivable that other laws may prevent pre-filing destruction of records, electronic or otherwise, or open a party to some kind of sanctions for not preventing it. Looking at the problem from the perspective of the party wanting preservation, ideally the defendant would have to save everything relevant to the complaint once the complaint had been served. The problem is that complaints are often written broadly so that they provide relatively little notice of what is really at issue. Similarly, the real issue may turn out to be a response to an affirmative defense of the defendant, and that issue may not be apparent from even the most detailed complaints.

Proposed Rule 37(f) does not appear to provide a workable solution to these and other problems. First, it does not help defendants very much because the safe harbor begins only upon receiving the required notice. As I understood the case made by defense counsel, they want protection before getting notice, and this Rule does not appear to give it. Second, on the other side, the key term that triggers the retention obligation is that the records be "discoverable." What does that term mean in this context? Is a record that is claimed to be privileged discoverable or not under this provision? What if the claim is that the record is irrelevant, or that, under new Rule 26(b)(2) "not reasonably accessible"? Perhaps the better term would be "reasonably likely to be sought in discovery," but even that gives defendants wide leeway to destroy records.

Another problem with this draft is that it forbids all sanctions, making no distinctions between, on the one hand, dismissing the case, and, on the other, requiring the payment of costs and attorneys fees. Defense counsel have a point if their concern is that destruction of records in the ordinary course of business may lead to a default judgment against their clients, but that suggests that the sanctions are too harsh, rather than that no sanction should be imposed at all. On the other side, allowing the sole copies of important records, whose relevance to the litigation is fairly obvious, to be "routinely destroyed" does call for significant sanctions.

Having heard both sides, it is my view that any attempt to write detailed rules in this area is almost certain to fail, either because they are too broad or too narrow. The far better approach is to direct district judges to exercise their discretion in these situations based on all the circumstances, making it clear that dismissal and similar sanctions should only be employed in the most egregious cases. Comments to existing Rule 37 would not

suffice, but I do not have specific language in mind that would clarify Rule 37 to be sure that sanctions are used appropriately in these circumstances. If the Committee is inclined to go in that direction, I would be happy to attempt to draft something.

Thank you for considering these comments, and if there is anything further that I can add, please do not hesitate to contact me.

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