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Via Federal Express and U.S. Mail

Peter G. McCabe
Secretary,
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe:

On behalf of the Federal Civil Procedure Committee of the American College of Trial Lawyers, we offer the following comments on certain of the proposed amendments to the Federal Rules of Civil Procedure circulated by the Committee on Rules of Practice and Procedure.

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is by invitation, extended only after careful investigation, to those experienced trial lawyers who have demonstrated exceptional skill as advocates and whose professional careers have been marked by the highest standards of ethical conduct, professionalism and civility. There are approximately 5400 Fellows of the College. Of course, 5400 trial lawyers seldom have a single, unified opinion; we cannot speak for the entire College, but what follows is the carefully studied opinion of our Committee, approved by the Executive Committee of the College.

The Committee agrees with – and applauds – the proposed revisions to Rules 16, 26 and 33, and to Form 35. We offer a few comments on the other proposals.

Rule 34. The concept of "electronically stored information" runs throughout the proposals. And while the addition of that term adds clarity in Rules 16, 26 and 33, we find it may do mischief in Rule 34. The proposed amendment to Rule 34 treats "electronically stored information" as a category of things distinct from "documents" yet defines "documents" to include "data or data compilations." We believe that has the potential for confusion; we see no need to treat electronically stored information as a category of information unto itself. We agree that arcane words such as "phonorecords" should be excised from the rule, but the emphasis on "electronically stored information" uses today's jargon to create tomorrow's arcanity. There is already great buzz that the next generation of computing will be based not on silicon but upon biometrics. We deal today with electronic storage; but we may tomorrow use chemical or cellular storage. We believe the emphasis on the rule should be on the production of tangible ***information***, no matter how maintained. So we suggest that Rule 34(a) might be amended to read:

> **(a) 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, copy, test or sample any designated information which exists in tangible form or is stored in some medium capable of retrieval in tangible form no matter how maintained, including but not limited to writings, drawings, graphs, charts, photographs, sound recordings, data and data compilations . . ."

Our Committee is not unanimous on this – or any other – particular language, because, frankly, we have found it difficult to arrive at simple language to properly convey what is a simple thought. The thought is to make clear that Rule 34 is intended to address the discovery of information which already exists in some way retrievable in tangible form. Other rules address other types of information. Rule 30 provides for depositions to retrieve information stored in the human mind; Rule 33 provides for interrogatories to retrieve information which may not already exist and which needs to be created for response. So the language suggested here could use further thought and refinement; and whatever language is adopted may benefit from explanatory commentary.

Although we focus on Rule 34, our suggestion, if adopted, would need to be conformed throughout the Rules, just as the theme of the current proposals is to incorporate the notion of electronically stored information throughout. We believe that the broad notion of "information" should be the theme rather than singling out one type of information (albeit that electronically stored information is today's Pet Rock).

Rule 37. Our Committee had enormous difficulty trying to come to a consensus on a position on this proposed amendment. Our inability to reach a single position makes it impossible to offer any constructive suggestion other than to urge your Committee to take a further hard look at the proposal. But we do offer the following thoughts.

We unanimously recognize the validity of the concerns behind draft Rule 37(f) and we support the principle of a safe harbor provision. But the Committee cannot agree whether the safe harbor these proposed amendments would establish is adequate or realistic. Some of our members believe the proposal is a good start and should be adopted (indeed, those members feel the safe harbor might be dredged deeper and wider to offer broader protection). Others of us believe that the proposal is illusory, and provides no new protection: the proposed amendment appears to afford a safe harbor from sanctions under the Federal Rules of Civil Procedure for conduct which may not be punishable under those Rules; the proposed safe harbor would protect only a party who, in the absence of a court order requiring preservation, "took reasonable steps to preserve the information." There is, however, no provision in the Federal Rules of Civil Procedure authorizing the imposition of sanctions on a party who, in the absence of a court order requiring preservation, failed to preserve information despite all reasonable efforts to do so.

Those of us who believe the safe harbor as proposed may be illusory believe that it might be helpful for the Rules to articulate a standard for preservation -- and for production. While preservation is a sine qua non for production, the two are not synonymous.[1] The discovery rules (Rules 26-34 and 45) are concerned with the exchange of information in advance of trial. Proposed Rule 37(f) is focused solely on preservation and does not address production. The discovery rules have no stated standard of care even for production, let alone the antecedent issue of preservation. It would enhance any safe harbor – and the entire body of Federal Rules -- if the Rules were amended to state a standard of care for production and preservation – which we think should be reasonableness. The safe harbor would then protect any party who took reasonable steps to preserve and produce requested information.

The safe harbor proposed in draft Rule 37(f) is limited to circumstances in which information is lost "because of the routine operation of the party's electronic information system." As we earlier commented, we do not believe that the circumstances of electronic information should be the limiter. There are many other situations in which data – stored electronically, on paper or whatever -- may be lost and, if reasonable steps have been taken to preserve that information, the Committee believes strongly that the same safe harbor

[1] *See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) (sanctions may be appropriate for unreasonably delayed production of electronically stored information that was fully preserved).

should apply. As drafted, one reasonable construction of the proposed amendment is that a party may be subject to sanction for failing to preserve information lost for any reason other than routine operation of the party's electronic information system, despite having taken reasonable steps to preserve the lost information. If a safe harbor is introduced into the Rules, it should extend to all types of information that a party has taken reasonable steps to preserve and produce.

Because the proposed safe harbor applies only to information lost due to "the routine operation of the party's electronic information system," the draft could encourage parties to adjust their routine operations to accelerate deletion of information. Some of us are comfortable with that, some are not. But we urge your Committee, to the extent that it has not already done so, to think through the implications of encouraging the rapid, routine destruction of information.

Rule 45. The Committee supports the concept in the proposed amendment to (d)(2)(B) which would purport to protect non-parties from inadvertent waiver of privilege; but we question whether that provision is valid under the Rules Enabling Act, 28 U.S.C. § 2074, which, of course, requires an Act of Congress to create, abolish or modify an evidentiary privilege. Moreover, we question whether the Federal Rules can trump the privilege rules in the individual states. This "protection," therefore, may lead to litigation and may create a false sense of comfort that could do more harm than good.

We understand that the provision which allows the subpoenaing party to specify the form in which electronic data is to be produced is designed for consistency with the amendments to Rule 34, with which we are in agreement. But while it is one thing to allow parties to make such presumptive requests of one another, it is a different matter to put such potential burdens on non-parties. We believe that non-parties should always enjoy the presumption that they may use the least expensive means to make full production of information. We oppose the proposal as drafted to the extent that it shifts the presumption against non-parties.

Rule 50. Our Committee is unable to come to consensus on the proposed amendment to Rule 50. Some of our members support the notion of removing traps for the unwary; others believe that it is not unreasonable to require that parties be wary of and follow the rules, and the rule as it exists serves a salutary purpose of permitting the trial court the opportunity to correct its own errors. So, as a Committee, we neither support nor oppose the proposal on Rule 50.

We appreciate this opportunity to express our views. And while we speak here only as a Committee, we think it is fair to say on behalf of all 5400 Fellows that we greatly appreciate the hard and important work of the Committee on Rules of Practice and Procedure.

Sincerely,

Robert L. Byman
Chairman
ACTL Federal Civil Procedure Committee

cc:

James W. Morris III,
President, ACTL

Committee Members