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Subject Comments on the proposed amendments to the Federal Rules

To: Committee on Rules of Practice and Procedure

I am a senior attorney with a Federal government agency. I have the following comments with respect to the proposed amendments to the Federal Rules of Civil Procedure, in particular the amendments related to electronic discovery.

The only amendment proposed for Rule 37 with respect to electronically stored information is to say that a court may not impose sanctions for failure to preserve electronically stored information unless the party violated an order requiring it to do so. I believe that an additional amendment is needed. Specifically, I believe that a court should not be able to sanction a responding party for failure to disclose electronically stored information if the party took reasonable measures to search for information within the scope of the request and that the reason the information was not disclosed was because the party's search did not identify the information.

I believe that it is important to make clear in the proposed Rules that different standards have to apply to the discovery of electronically stored information than apply to information stored as hard copy. This is because the method used in searching through electronic files is different than the one that would be used to search through files that are in hard copy. To give an example, companies that have internal email systems may have a database of the emails sent and received by each of its employees. If a requesting party asks the company for documents related to a particular topic, the company could conduct a diligent search of the emails sent/received by specific individuals who would be likely to have sent emails related to the topic during a specific period of time, using keywords it believes would be likely to uncover information on this topic, but still not uncover all of the emails related to that topic for a variety of reasons, *e.g.* , the emails did not contain any of the keywords; the emails were sent or received by another employee; the emails were sent during a different time period, etc. However, if the company had individually gone through all of the emails sent or received by all of its employees over an extended period of time, the company would have uncovered additional documents that were within the scope of the request. The Committee recognizes in its notes regarding the screening that must be done for a privilege review, that this kind of search would be extremely onerous and the proposed rules therefore contain a procedure where the parties can stipulate to a nonwaiver provision in connection with the production of electronic files. I believe that the Rules should set forth a standard to which parties will be held in connection with searches of an electronic database, and that absent unusual circumstances, sanctions will not be imposed on a responding party who fails to produce information contained in the party's electronic database if the party made a reasonable search of the database, simply because the party failed to conduct an individual review of each document stored in the database.

Finally, I suggest that discussion in the Committee's note on proposed Rule 37(f) on determining the reasonableness of a party's steps to preserve electronically stored information go into more detail on what it calls "the third limit," *i.e.* "what the party knows about the nature of the litigation," and when the party obtained this knowledge. The note states: "The third limit depends on what the party knows about the nature of the litigation. That knowledge should inform its judgment about what subjects are pertinent to the action and which people and systems are likely to have relevant information. Once the subjects and information systems are identified, e-mail records and electronic 'files' of key individuals and departments will be the most obvious candidates for preservation. . . . In assessing the steps taken by the party, the court should bear in mind what the party knew or reasonably should have known when it took steps to preserve information."

My concern is that at the time a complaint is filed, a party may have some information about the broad nature of the action, but not have sufficient knowledge of the particulars to know who the "key individuals and departments" are whose email records and electronic files need to be preserved. That information may not emerge until after depositions have been taken. Sanctions should not be imposed against a party who has taken reasonable steps to preserve electronic information related to the litigation, based on what the party knew of the litigation at the time the court's order was entered.

I also suggest that the Committee's note acknowledge the fact that, unlike the case of records that are stored in hard copy format, employers cannot be presumed to be aware of the contents, or even the subject, of electronic records in its employees' possession. This is particularly true in the case of e-mails. It is commonplace now for employees to use an employer's e-mail system for purposes that are not related to the employer's business. In fact there have been a number of law review articles about whether an employer has the right to monitor its employees' e-mail communications. *See,* Jarrod J. White, *E-Mail@ Work.Com: Employer Monitoring of Employee E-Mail* , 48 Ala. L. Rev. 1079, 1083 (1997); *Comment, E-Mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute,* 44 Am. U. L. Rev. 219 (1994).

If relevant information is destroyed because the information was stored in the electronic records of one of the party's employees, and the party did not know that the employee might have information related to the litigation and therefore did not take steps to preserve the employee's emails and electronic files, a court should not impose sanctions unless the party reasonably should have known that the employee could have relevant information.

Thank you for the opportunity to present these comments.

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